Supreme Court, U. S.
FILED
AUG 26 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1347

THE BOARD OF SCHOOL COMMISSIONERS
OF THE CITY OF INDIANAPOLIS, et al.,
Petitioners,

-vs-

JEFF JACOBS, SUSAN CHANDLER, et al.,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FORR THE
SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

Craig Elden Pinkus
1125 Circle Tower Building
Indianapolis, Indiana 46204
(317) 638-6551

Ronald E. Elberger
Indiana Civil Liberties Union
445 North Pennsylvania Street
Suite 604
Indianapolis, Indiana 46204
(317) 635-4056

Attorneys for Respondents

INDEX

	Page
Table of Authorities	v
Opinions Below	1
Jurisdiction	2
Constitutional, Statutory and Regulatory Provisions Involved	2
Questions Presented	4
Statement of Case	6
Summary of Argument	14
Argument I	20
A. The Standards of "Vagueness" and "Overbreath" Which Limit the Board's Power to Regulate Student Publications Do Not Differ Significantly from the Standards Applied in First Amendment Criminal Cases	20
B. 1. Schools May Not Generally Prohibit Distribution of Non-Official Student Publications	30
2. The Special Characteristics of the School Environment Affect Student First Amendment Rights	30

Page

Argument II 46

A. Rules 11.06 and 11.05, Section 1.3.1.5, Of The Policies and Regulations Of The Board Of School Commissioners Of The City Of Indianapolis, Which Prohibit The Sale, Soliciation and Receipt of Contributions By Public High School Students Who Distribute The "Corn Cob Curtain", A Student Publication, On, In Or About Public Schools, Contravene The Rights Of Public High School Students To Freedom Of The Press, Speech, And Expression 46

1. Sales and Contributions On School Property 47

2. Substantial Justification Supportive of a Compelling Legitimate State Interest Affirmatively Established vs. Mere "Reasonableness" 53

B. In The Absence of Explicit Definitions or Procedures By Which To Determine a Likelihood of Disruption, Rule 11.05, Section 1.1.1.3 Is Unconstitutionally Vague And Overbroad 57

C. Rule 11.05, Sections 1.1.1.4

and 1.3.1.6 Of the Policies And Regulations Of the Board of School Commissioners Of the City Of Indianapolis Which Prohibit Distribution Of Student Publications In Public High Schools Which Are Not Entirely Written By Students Or School Employees And Which Further Require All Contributors To Be Named, Contravene And Violate The First Amendment Rights Of Public High School Students To Freedom Of Press, Speech And Expression 64

1. Articles May Be Written By Non-Students 64

2. A Rule Requiring Disclosure of Publication Of Participants Is Invalid 68

D. The "Any Classes Rule" Is An Overbroad, "Time, Place and Manner" Regulation Which Could Operate as a Ban on All Nonofficial Student Publications 75

1. The Board's Arguments Concerning Class Arrangements and Schedules Assume Evidence Which Was Not Introduced and For Which the Board Bore the Burden of Proof 76

Page

2. The "Any Classes Rule" Goes Beyond Any Decision on Distribution of Non-Official Student Publications 80

Argument III

The Board May Not Constitutionally Punish the Infrequent Use Of "Earthy Words" Used for Emphasis or Humor on the Bases of Rules Not in Existence, of Distribution to Elementary School Students Which Did Not Occur, or as "Obscene As To Minors" in the Abscence of Erotic Content, Appeals to Prurient Interests and Patent Offensiveness 83

1. The Board Has Promulgated No Rules Which Prohibit "Filthy, Vulgar, and Indecent" Language 85

2. These Proceedings Do Not Involve Distribution of Publications To Elementary School Students 87

3. Neither the "CCC" as a Whole Nor Individual Articles Taken Out of Context Are Obscene 89

Argument IV

A School Board Rule Which

Page

Requires Prior Approval By Public School Authorities Of An Unofficial Student Newspaper Before Publication In The Secondary Schools Is Unconstitutional 106

Argument V

Minor Public High School Students, Who Are The Real Parties In Interest In Litigation Challenging The Constitutionality Of Public High School Regulations Which Require Prior Unilateral Administrative Approval Of Student Publications And Which Prohibit The Sale And Distribution Of Student Publications, May Properly Sue In Federal District Court In Their Own Names Pursuant To Rule 17, Federal Rules Of Civil Procedure, Without Appointment Of A Guardian Ad Litem, Especially Where Some Of The Student Plaintiffs Are No Longer Minors 108

Conclusion 113

TABLE OF AUTHORITIES

CASES

	Page
Adderley v. Florida, 385 U.S. 39 (1966)	24, 47, 48
Allen-Bradley Local 1111 v. Wisconsin Employment Rel. Bd., 315, U.S. 740 (1942)	86
Anniston Mfg. Co. v. Davis, 301 U.S. 337 (1937)	86, 107
Antonelli v. Hammond, 308 F. Supp. 1329 (D. Mass. 1970)	55, 66
Baker v. Downey City Board of Education, 307 F. Supp. 517 (C.D. Cal. 1969)	97
Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963)	65
Bartels v. Iowa, 262 U.S. 404 (1923)	23
Bates v. Little Rock, 361 U.S. 516 (1960)	74 - 75
Bayard v. Lombard, 9 HOW, 530	85
Bazaar v. Fortune, 476 F. 2d 570, 580 (5th Cir. 1973)	94, 95

Page

Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 at 397-398 (1971) 87

Board of Regents v. Roth, 408 U.S. 564 (1972) 23

Brandenburg v. Ohio, 395 U.S. 444 (1969) 70

Branzburg v. Hayes, 408 U.S. 665 (1972) 72

Breen v. Kahl, 419 F. 2d 1034, (7th Cir. 1969) 63

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 54

Burnside v. Byars, 363 F. 2d 744 (5th Cir. 1966) 69

Bursey v. United States, 466 F. 2d 1059 (9th Cir. 1972) 74

Burnstyn v. Wilson, 343 U.S. 495 (1951) 51

Carroll v. Commissioners of Princess Anne, 393 U.S. 175 (1968) 21

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) 103, 106

Cincinnati v. Vester, 281 U.S. 439, (1929) 86

Cloak v. Cody, 326 F. Supp. 391

Page

(N.D.N.C. 1971) Vactd as Moot, 449 F. 2d 481 (4th Cir. 1971) 37, 38, 55

Coates v. City of Cincinnati, 402 U.S. 611 (1971) 42

Cohen v. California, 403 U.S. 15 (1971) 93, 97, 103 - 106

Communist Party of Indiana v. Whitcomb, ___ U.S. ___, 38 L. ed 2d 635 (1974) 24, 69 - 70

Connally v. General Construction Co., 269 U.S. 385 (1926) 20 - 21, 62

Cox v. Louisiana, 379 U.S. 536 (1965) 48

Cox v. New Hampshire, 312 U.S. 569 (1941) 80

Cramp v. Board of Instruction, 368, U.S. 278 (1961) 70

Crews V. Cloncs, 432 F. 2d 1259 (7th Cir. 1970) 63

Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) 72

Dandridge v. Williams, 397 U.S. 471 (1970) 35

Page

DeFunis v. Odegaard, ___ U.S. ___, 40 L. ed 2d 164 (1974) 7

Diffenderfer v. Central Baptist Church, 404 U.S. 412 (1972) 85

Dombrowski v. Pfister, 380 U.S. 479 (1965) 69

Eaton v. City of Tulsa, ___ U.S. ___, 39 L. ed 2d 639 (1974) 93, 94, 97, 104

Edwards v. South Carolina, 372 U.S. 536 (1963) 48

Eisner v. Stamford Board of Education, 440 F. 2d at 809 107

Elfbrandt v. Russell, 384 U.S. 11 (1966) 70

Ex Parte Jackson, 96 U.S. 727 (1917) 51

Flower v. United States, 407 U.S. 197 (1972) 33

Grosjean v. American Press Company, 297 U.S. 233 (1935) 51

Hague v. C.I.O., 307 U.S. 496 (1939) 48

Hall v. Beals, 396 U.S. 45 (1969) 85

Hatter v. Los Angeles City High

Page

School Dist., 452 F. 2d 82 - 83

Healy v. James, 408 U.S. 169 (1972) 25, 65, 107

Herndon v. Lowry, 301 U.S. 242 (1936) 62

Hess v. Indiana, ___ U.S. ___, 38 L. ed. 2d 303 (1973) 104

In Re Gault, 387 U.S. 1 (1967) 28, 109

In Re Grimley, 137 U.S. 147 (1890) 33

Interstate Circuit v. Dallas, 390 U.S. 676 (1968) 21

Jacbos, et al. v. Board of School Commr's of the City of Indpls., et al., 490 F. 2d 601 (7th Cir. 1973) 1, 64

Jacobs, et al. v. Board of School Commr's of the City of Indpls., et al., 349 F. Supp. 605 (S.D. Ind. 1972) 2, 30, 31

Katz v. McAulay, 438 F. 2d 1058 (2nd Cir. 1971), Cert. Den. 405 U.S. 933 (1972) 37 - 38, 55

Keefe v. Geanakos, 418 F. 2d, 359 (1st Cir. 1969) 99 102

Keyishian v. Board of Regents, 385 U.S. 589 (1967) 23, 65

Lanzetta v. New Jersey, 306 U.S. 151 (1939) 21

Lewis v. New Orleans, 408 U.S. 1053 (1972) 104

Lovell v. Griffin, 303 U.S. 444 (1937) 51, 72

Meyers v. Nebraska, 262 U.S. 390 (1923) 22

Miller v. California, 413 U.S. 15 (1973) 18, 21, 90 - 91, 96 - 97

Mills v. Alabama, 384 U.S. 214 (1966) 72

Murdock v. Pennsylvania, 319 U.S. 105 (1942) 52

N.A.A.C.P. v. Alabama, 357 U.S. 449 (1957) 74

Near v. Minnesota ex rel. Olson, 283 U.S. 697 (1930) 51, 58, 107

New York Times Co. v. Sullivan 67

New York Times Co. v. United States, 403 U.S. 713 (1971) 52, 64, 67 -68, 74

Noto v. United States, 367 U.S. 290 (1961) 70

Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) 56

Page

Papish v. University of Missouri, 410 U.S. 667 (1973) 65, 84 87,92, 97. 104 - 106

Paris Adult Theater I v. Slaton, 413 U.S. 49 (1973) 21

Parker v. Levy, ___ U.S. ___, 41 L. Ed. 2d 439, 42 L.W. at 4980 - 4981 (1974) 33, 34

Pickering v. Board of Education, 391 U.S. 563 (1968) 23

Pierce v. Society of Sisters, 268, U.S. 510 (1925) 23

Police Department of Chicago v. Moseley, 408 U.S. 92 (1972) 23, 66, 107

Quarterman v. Byrd, 453 F. 2d 54 (4th Cir. 1971) 82

Riseman v. School Committee of City of Quincy, 439 F. 2d 148 (1st Cir. 1971) 25, 57

Roberts, et al. v. Ohio Casualty Insurance Company, 256 F. 2d 35 (5th Cir. 1958) 111, 112

Robinson v. American Broadcasting Companies, et al., 441 F. 2d 1396 (6th Cir. 1971) 58

Page

Rosenbloom v. Metromedia, 403 U.S. 29 (1971) 72

Rosenfeld v. New Jersey, 408 U.S. 901, 904 (1972) 104 - 105

Roth v. United States, 354 U.S. 476 (1957) 59

San Antonio School District v. Rodriquez, 411 U.S. 1 (1973) 35, 36

Scales v. United States, 367 U.S. 290 (1961) 70

Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) 70

Scoville v. Bd. of Ed. of Joliet Tp. H.S. Dist. 204, 425 F. 2d 10 (7th Cir. 1970). Cert. Den. 400 U.S. 826 (1970) 55, 56, 63, 83, 109

Shanley v. Northeast Independent School Dist., 462 F. 2d 960 (5th Cir. 1972) 82

Shelton v. Tucker, 364 U.S. 479 (1960) 21, 25, 35, 65

Shuttlesworth v. Birmingham, 394 U.S. 147 (1969) 80

Stromberg v. California, 283

Page

U.S. 359 (1930) 62

Sullivan v. Huston Independent School Dist., 475 F. 2d 1071 (5th Cir. 1973) 37, 56 - 57, 98

Sweezy v. New Hampshire, 354 U.S. 234 (1959) 67

Talley v. California, 362 U.S. 60 (1960) 73 - 74

Till v. Hartford Accident & Indemnity Co., 124 F. 2d 405, 408 (10th Cir. 1941) 112

Time v. Hill, 385 U.S. 374 (1967) 51, 71

Tinker v. Des Moines Community School Dist., 393 U.S. 503 (1969) 14, 22, 24 - 26, 30 - 35, 37, 53 - 55, 58, 63, 65, 67, 77, 80, 81, 93, 94, 107,109

Travelers Indemnity Company v. Bengtson, 231, F. 2d 263, 265 109

United States v. Petrillo, 332 U.S. 1 (1946) 59

Vought v. Van Buren Schools, 306 F. Supp. 1338, 1394-1396 (ED. Mich. 1969) 98, 102

Page

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) 21

Westcott v. United States Fidelty & Guaranty Co., 158 F. 2d 20, 22 (4th Cir. 1946) 112

Winters v. New York, 333 U.S. 507 (1948) 61

Yates v. United States, 354 U.S. 298 (1957) 70

Younger v. Harris, 401 U.S. 37 at 53 (1971) 86

CONSTITUTION, STATUTES, REGULATORY PROVISIONS

	Page
Constitution of the United States, First Amendment	2, 4, 6, 12-13, 15-17, 19-26 42, 45, 47-48, 51-52, 54-57, 61 61, 64-68, 70 73, 83, 87, 93
Fourteenth Amendment	2, 4, 6, 12, 61, 62, 93
I.C. 1971 34-1-67-1(6)	3, 112
I.C. 1971 34-1-67-1(15)	3, 110, 112
Ind. Ann. Stat. §28-5358, I.C. 1971 20-8.1-5-1	27
Ind. Ann. Stat. §28-5390c, I.C. 1971 20-8.1-5-4	29
Fed. R. Civ. P., 17(c)	2, 6, 111
Fed. R. Civ. P., 17(a)	6, 108
Fed. R. Civ. P., 17(b)	110-112
Fed R. Civ. P., 23(a)	7
Fed. R. Civ. P. 23(b)(a)	7

	Page
Pol. & Reg. of Bd. of Schl. Commr's of City of Indpls. 11.05	9, 12, 13
§1.1.1.1 and §1.1.1.3	57, 58, 59, 61, 63, 73
§1.1.1.4	64, 65, 66, 67, 68, 73
§1.3.1.1	75
§1.3.1.5	46, 47, 50, 51, 54-57, 73
§1.3.1.6	64-65, 68, 71, 73, 75
11.06	9, 12-13, 46-47, 50-51, 54,56-57

MISCELLANEOUS

2 Barron and Holtzoff, Federal Practice and Procedure (Wright ed., 1961) §488	111
Meikiejohn, Political Freedom: The Constitutional Powers of The People 27 (1948)	58
3A J. Moore, Federal Practice, §17.02, at 53 (2d ed. 1970)	108

Page

3A J. Moore, Federal Practice §17.26 at 901 (2d ed. 1970) 111

6 Wright and Miller, Federal Practice and Procedure §1542 at 639 (1971) 109

The New Yorker, "Moses and LaGuardia, 45 and f. 101

Time, "Nixon Listens to His Tapes" 23; July 29, 1974. 102

Time, "Stay to Hell Out of This" August 19, 1974 102

Wall Street Journal, "Help For the President", Wednesday, July 17, 1974, p. 12 101

Webster's New Collegiate Dictionary (1973) 463, 1038 and 1071 101

Webster's New International Dictionary of the English Language (2d unabr. ed. 1950). 60

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1347

THE BOARD OF SCHOOL COMMISSIONERS
OF THE CITY OF INDIANAPOLIS, et al.,
Petitioners,

-vs-

JEFF JACOBS, SUSAN CHANDLER, et al.,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, filed December 14, 1973, is reported at 490 F.2d 601, and is

reprinted at App. Pet. Cert. 16-31. The October 19, 1972, opinion of the United States District Court for the Southern District of Indiana is reported at 349 F.Supp. 605 and is reprinted at App. Pet. Cert. 5-15. The Findings of Fact and Conclusions of Law of the District Court is reprinted at App. Pet. Cert. 1-4.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Brief for the Petitioners.

Constitutional, Statutory and Regulatory Provisions Involved

The pertinent provisions of the First and Fourteenth Amendments to the Constitution of the United States, Rule 17 (c) of the Federal Rules of Civil Procedure, and the applicable Rules of the Board of School Commissioners of the City of Indianapolis are set forth in the Brief for the Petitioners and in the Appendix.

Trial Rule 17 (c)(1), Indiana Rules of Trial Procedure, provides:

> (C) Infants or incompetent persons - Unborn, unknown,

and unlocated persons. An infant or incompetent person may sue or be sued in any action:

(1) in his own name;

IC 34-1-67-1(6) and (15) provide:

34-1-67-1 [2-4701]. Certain words, how construed. - In the construction of this article [34-1-1-1 - 34-1-68-1], the following rules shall be observed, when consistent with the context:

...

(6) The phrase "under legal disabilities" includes persons under the age of eighteen [18] years, or of unsound mind, or imprisoned in the state's prison, or out of the United States;

...

(15) The Terms "infant," "minor," or "person in his minority" mean any person under eighteen [18] years of age. The terms "adult," "of full age" and "person in his majority" mean any person at

least eighteen [18] years of age. [Acts 1881 (Spec.Sess.), ch. 38, §857, p. 240; 1973, P.L.313, §3, p. 1715.]

Questions Presented

The following statement of questions presented is set forth solely to clarify the issues to be adjudicated by this Court.

1. May a school board constitutionally adopt and enforce rules governing student conduct in the secondary public schools which:

a. Are vague and overbroad or which subject students to disciplinary measures for the exercise of First Amendment rights?

b. Impose significantly greater restrictions, excepting reasonable regulation of time, place and manner of distribution, upon the First Amendment rights of public secondary school students who distribute an unofficial student publication within the public secondary schools?

2. Do the First and Fourteenth Amendments prohibit a public school

board from adopting rules concerning the distribution of literature by students in its secondary schools which subject students to disciplinary measures for:

a. Solicitation of funds or sales of literature to students within the secondary schools;

b. Distribution of literature "that is either by its content or by the manner of distribution itself, productive of, or likely to produce a significant disruption of the normal educational processes, functions or purposes in any of the Indianapolis schools, or injury to others", in the absence of any explicit definitions or procedures by which a conjectural liklihood of disruption is determined;

c. Student distribution of anonymous literature or literature which is not written by a student or school employee; and

d. Distribution of literature by students in school while classes are being conducted in the school in which the distribution is to be made.

3. Whether the infrequent use,

in an unofficial student newspaper, of a few expletives and earthy words constitutes obscenity as to public high school students, and may public school authorities punish students for the use of language which appears in an unofficial student newspaper which is defined by public school authorities as filthy, vulgar and indecent?

4. Do the First and Fourteenth Amendments to the United States Constitution prevent a public school board from adopting rules which require prior approval by public school authorities of an unofficial student newspaper before distribution in the secondary schools?

5. Whether minor plaintiffs, real parties in interest in litigation challenging the constitutionality of public high school regulations which require prior unilateral administrative approval of student publications before distribution and which prohibit the sale and distribution of student publications, may sue in their own names in federal district court pursuant to Rule 17(b) and (c), Federal Rules of Civil Procedure?

Statement of the Case

During July, 1971, plaintiffs,

public high school students in the Indianapolis Public Schools, all of whom have since graduated,[1] met for the purpose of forming an unofficial student newspaper entitled the "Corn Cob Curtain" (hereinafter referred to as "CCC") (R.7, Tr. 137, 235). The "CCC" was formed due to the uninformative and controlled nature of the regular high school newspapers (Tr. 136), the name "CCC" being derived by analogy to the Iron Curtain - Indiana being known for corn - and the comparative lack of information available to those either behind the iron or the corn cob curtain (Tr. 78, Pl.Exh. 1 at p. 1).

---

[1] Susan Chandler and Sally Swan graduated from Thomas Carr Howe High School and Arsenal Technical High School, respectively, Indianapolis Public Schools, subsequent to the filing of the "Brief For Respondents in Opposition" but prior to the date on which the petition for a writ of certiorari was granted by this Court. Inasmuch as the cause proceeded as a class action pursuant to Rule 23(a) and (b)(2), F.R.C.P., (App. 5A), and prospective injunctive relief was granted by the courts below, respondents do not believe the issues raised herein are moot, see, DeFunis v. Odegaard, -U.S.-, 40 L.Ed.2d 164, 169-170 (1974).

Five issues of the "CCC" were published by the students during the 1971-1972 public school term (R. 16-39, Exhibits "A" through "E" to Complaint, Tr. 152-153, designation changed to Pl.Exh. 1 through 5). The first four issues of the "CCC" contained poetry, opinion letters, articles on student rights, the authority of school administrators, beading, student walkouts, public aid to private schools, draft counseling, reviews of musical performances, book reviews, commentaries on censorship, student union organization, student councils, curfews, and had cartoons containing opinion commentary. (Pl.Exh. 1 through 4).

Each of the students, during the 1971-1972 public school term, assisted in the publication and distribution of the "CCC" (Jacobs Affidavit, R.52,53, Tr. 136, 139, 145, 146; Chandler Affidavit, R.54, Tr. 236, 237; Laubach Affidavit, R.56; Rood Affidavit, R.58; Swan Affidavit, R.60, Tr. 234-236; Yarbrough Affidavit, R.62, Tr. 82.), distribution having occurred on numerous occasions in the Indianapolis Public Schools (App. 28-29, Tr. 149, 240, 246, 336) as well as off school property (App. 41). The "CCC" was sold to students, faculty members and administration officials by the plaintiffs although no set price was established. In exchange for copies of the unofficial

student newspaper some students and faculty members made voluntary contributions, while other copies of the "CCC" were provided at no cost. (App.28-29, Tr. 148, 245, 341). Material submitted for publication was solicited (App.58-59) and was unedited (App. 28).

On February 9, 1972, an announcement was made over the public address system of Arsenal Technical High School to the effect that students could not "sell or solicit on school property." (Tr.241). On that same date the students were notified by the Principal of Arsenal Technical High School in a written bulletin that:

> "It is against school board rules to sell any item on school grounds without the express prior approval of the General Superintendent." (Pl.Exhibit 6, Tr.152-153)

The rule referred to in the Arsenal Tech bulletin was Chapter XI, Sections 11.05 and 11.06 of the Policies and Regulations of the Board of School Commissioners of the City of Indianapolis (Pl. Exhibit 7, Tr.241, 245, Pl. Exhibit 8, Tr.342-343). At this time Volume I, Issue 5 of the "CCC" was ready for distribution by the plaintiffs, said issue containing a brief telephone directory, letters

to the editor, articles on education, the draft, amnesty to war resisters, new academic courses, Appalachia, how West Virginia became a state, state legislative proceedings, school board meetings, the Baha'i faith, musical previews, poetry and a cartoon containing opinion commentary. (Pl. Exhibit 5)

On February 15, 1972, Jeff Jacobs spoke with then Assistant Superintendent Karl Kalp who advised him that "individual high school principals had that authority, to approve or disapprove such a publication" (App. 29, Jacobs Affidavit, R.51).

On February 16, 1972, Ray Reed, principal of Arsenal Technical High School, informed Jeff Jacobs that Karl Kalp had requested that all issues of the "CCC" be sent to Mr. Kalp. (Jacobs Affidavit, R.51, Tr.155). On February 18, 1972, plaintiffs were informed that then Assistant Superintendent Kalp had decided to ban distribution of the "CCC" (App.30, Jacobs Affidavit, R.52) because Kalp believed it to be obscene (App.30, 13-15), said determination being based upon the infrequent presence of certain earthy words and expletives (App.53-64) conveniently extrapolated from issues of the "CCC". In response to the ban against distribution of the "CCC", the

student plaintiffs voluntarily stopped distribution (A-p.30) pending resolution of the dispute by school administrators (App.7) with whom the students' negotiated from February 9, 1972, to June 1, 1972.

Contrary to the assertions of the school board (Br.Pet.7), plaintiff Jacobs did not object to the infrequent use of expletives or earthy words which were used for emphasis (App.31) or sarcasm (App.37) in the "CCC" and which Jacobs had seen in nonfiction books and novels (App.40). Further, in the context in which they appeared (App.43) such expletives and earthy words were not not found to be offensive by plaintiff Chandler (App. 40) who had read the same words in "Catcher In The Rye", "Catch-22", "The Godfather" and other books which had been given to her by her mother, a history teacher at Eastwood Junior High School in Washington Township (App.41-43), a metropolitan school district adjacent to the Indianapolis Public Schools.

From February 9, 1972, until October 19, 1973, the student plaintiffs voluntarily refrained from distributing copies of the "CCC" in, on, or about the premises of any public high school pending determination of the issues presented before the United States District Court for the Southern District

of Indiana, Indianapolis Division, the Honorable William E. Steckler, presiding trial judge, where on June 1, 1972, plaintiffs filed their class action complaint for declaratory and injunctive relief and for compensatory and punitive damages against the individual members of the Board of School Commissioners of the City of Indianapolis, the Superintendent and Administrative Assistant of the Indianapolis Public Schools, seeking an injunction against the defendant Board members and school officials enjoining the defendants from prohibiting distribution of the "CCC" in the Indianapolis Public Schools. The students also sought a declaratory judgment that Board Rules 11.05 and 11.06 violated their First and Fourteenth Amendment rights. These Rules, which required the Superintendent's prior approval before sales or solicitations or the distribution of literature would be permitted in the schools, were declared unconstitutional by the District Court after an evidentiary hearing on August 24-25, 1972. The Court on August 24, 1972, also denied Defendants' petition for appointment of guardian ad litem or next friend for Plaintiffs and all members of the class they represented.

No affirmative evidence was produced by the school board members or school officials which showed that

the prior distribution of the four "CCC" issues resulted in disruption, violence or any substantial interference with the educational processes in the Indianapolis Public Schools, nor was there any evidentiary showing that distribution of Volume I, issue 5 (Pl. Exhibit 5) would cause such results, although unilaterally alleged by Superintendent Kalp (App.44-47, 12-13).

During September, 1972, pursuant to Court order (App.1-2) the Board amended its original Rules (App.17-20) which continued imposition of prior restraints upon the plaintiffs' rights to freedom of press, speech, thought and expression. Subsequently, pursuant to the September 29, 1972, court order (App.2) directing the Board to submit additional and/or supplemental guidelines regarding the sale and distribution of student publications, the Board amended its Rule 11.05 for the second time (App.22-26) retaining prior restraints in violation of the plaintiffs' First Amendment rights.

On October 19, 1972, the Court entered a permanent injunction against the Defendants, setting out certain conditions for Board rules and declared amended Rule 11.06 and five sections of amended Rule 11.05 unconstitutional, since which date the plaintiffs have

published, distributed and sold, or received voluntary contributions for five issues of Volume II of the "CCC" and for issues of Volume III. On November 9, 1972, Defendants filed a notice of appeal to the United States Court of Appeals for the Seventh Circuit from the judgment and order of October 19, 1972. The Court of Appeals affirmed the decision of the District Court, Judge Christensen dissenting in part, on December 14, 1973.

On March 5, 1974, the Board filed a Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit and on June 3, 1974, this Court granted the writ.

SUMMARY OF ARGUMENT

I

A. The First Amendment protects the expressive activities of public high school students. Tinker v. Des Moines Community School Dist., 393 US 503 (1969). Our national policy favors freedom of expression and opposes censorship. The concepts of "vagueness" and "overbreadth" have been applied in both civil and criminal proceedings which reviewed statutes, ordinances, administrative reg-

ulations, temporary restraining orders, and oral directives. No compelling reasons of policy or authority require significantly different results in the application of the First Amendment to expression by students in a non-official newspaper than to other kinds of fact situations in which other arms of the State seek to suppress expression.

B. The freedom of public high school students to distribute printed matter is clearly established. While the "special characteristics" of the school environment necessarily affect the Application of the First Amendment rights, restrictions of those rights by public school officials must be founded upon more than undifferentiated fear or the apprehension of disturbance. Far from dictating less free expression than is found in the community at large, our public high schools are peculiarly the marketplace of ideas. Student expression is therefore to be emphatically encouraged rather than suppressed. Whatever may ultimately be regarded as a definitive theory of the goal of public education, its purposes should not be viewed as opposed to the encouragement of student expression.

II

A. 1. The "CCC" was not a commercial publication circulated for profit. The freedom to circulate publications is as essential to freedom of the press as is the freedom to publish. The Board rules regulating student publications circulated in exchange for a set price or voluntary contributions effectively create a ban against public high school non-official publications because operating expenses, even in such a modest enterprise, could not entirely be met by the student publishers.

2. The Board's blanket prohibitions of all sales of non-official student publications is not a constitutionally valid regulation of "time, place, and manner of distribution." No evidence appears in the record of these proceedings showing material or substantial disruption of the work and discipline at the Board's high schools resulting from the circulation of "CCC" for free or for voluntary contributions. The protection of First Amendment rights demands more than mere "reasonableness" in public high school regulations.

B. The Board's rule which requires high school students to determine, without guidelines or definitions of any

kind, what literature would be "likely to disrupt" is vague and overboard under the First Amendment. Similarly, a rule which requires students to predict, without guidance of any kind, what literature would cause "injury to others" is vague and overboard.

C. 1. The Board's rule prohibiting the distribution of any literature not written by students or employees of the Board is an unconstitutional prior restraint through content control of literature produced by public high school students.

2. The Board's rule requiring the name of the author of any distributed literature is an unconstitutional interference with the well recognized right of anonymity in publications protected by the First Amendment. No evidentiary showing has been made which requires a ban on anonymity thereby creating a double standard between high school non-official publications and general circulated newspapers, magazines, and other publications.

D. 1. No evidence has been introduced by the Board which justifies a ban against any non-official literature distribution in any high school merely because one or more classes are in session somewhere within that school.

2. The Board's "any classes rule" goes beyond any decision on reasonable "time, place, and manner" regulations and can be tantamount to an effective ban against all distribution of high school student non-official publications.

III

1. The Board has presented an anticipatory constitutional question with respect to the usage of "filthy, vulgar, and indecent" language since the Board has no rules on the usage of language except for one which prohibits literature "obscene as to minors."

2. This litigation has not involved distribution of "CCC" to minors at any time or under any circumstances.

3. The "CCC" is not "Obscene as to minors". The Board's "adapted" version of the tests propounded in Miller v. California, 413 US 15 (1973) has not been promulgated in any regulation or orally applied to the "CCC" in these proceedings. The usage of "earthy words" in "CCC" is exclusively for emphasis or humor, and the publication does not have erotic content or otherwise appeal to prurient in-

terests. The expulsion of students or the censorship of non-official publications for the mere use of "earthy words" - in the absence of reasonable "time, place, and manner" regulations, actual disruptions, or other constitutionally permissible considerations - creates an impermissible double standard between high school non-official publications and magazines, dictationaries, novels, and other literary materials commonly found in all public high schools. Offenses to "sensibilities" in the absence of genuine disruption or likelihood of disruption, fighting, or other significant and measurable harm (and in the absence of any limiting or defining regulations concerning the concept of "sensibilities") may not constitutionally serve as the basis for suppressing First Amendment rights which involve the infrequent use of "earthy words."

IV

A. The Board is seeking review of prior approval rules which were superceded by other rules promulgated by the Board itself. The Board again has presented an anticipatory question and, furthermore, has asked the Court to select from among various possible

rules and write those rules for application retroactively to the facts of this case.

V

The District Court's determination that minor and former minor respondents in these proceedings require no guardian ad litem was in accordance with Indiana procedure and founded upon a correct finding that no inadequacies of representation or prejudice resulted to any of the respondents in the litigation.

ARGUMENT I

A.

The Standards of "Vagueness" and "Overbreath" Which Limit the Board's Power to Regulate Student Publications Do Not Differ Significantly from the Standards Applied in First Amendment Criminal Cases.

The standards or tests applied in First Amendment cases under the labels "vagueness" and "overbreadth" have been employed in both civil and criminal contexts. E.g. Connally v. General Construction Co., 269 US

385 (1926); Lanzetta v. New Jersey, 306 US 151 (1939) The essential qualities of these tests of standards have been stated in various ways, including holdi ngs that "the State may not employ 'means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.'" Shelton v. Tucker, 364 US 479 (1960), quoted in Carroll v. Commissioners of Princess Anne, 393 US 175 at 183-184 (1968). This Court has recognized that the concept of vagueness can be applied to civil scheme of censorship even though it is at a classification rather than direct suppression stage. Interstate Circuit v. Dallas, 390 US 676, 688-689 (1968). The Obscenity Cas : decided in June of 1973 included one case involving civil declaratory and injunctive claims as opposed to a criminal prosecution, Paris Adult Theater I v. Slaton, 413 US 49 (1973). That case was decided on the same grounds as were those involving criminal prosecutions (e.g. Miller v. California, ___ US ___, 37 L.Ed.2d 419 (1973)), and in the face of dissents arguing that the actions taken were both vague and overbroad. First Amendment standards and tests have long been applied to the regulations and procedures of public schools. Se e.g. West Virginia State Board of Education v. Barnette, 319 US 624 (1943).

In the last decade, this Court gave increased attention to the application of First Amendment principles in both high school and university settings. Cases involving high schools and universities reached a variety of results on First Amendment questions. The policy which runs consistently through those cases, and which continues to date, is that our "state-operated shcools may not be enclaves of totalitarianism." Tinker v. Des Moines Community School Dist.,393 US 503, 511 (1969). Although the Board's brief alludes throughout its pages to the pursuit of "valid educational goals (e.g. Br. Pet. 8)," it offers virtually no specifications concerning such goals. It is, hopefully, still clear that the goals may not constitutionally be calculated to "foster a homogeneous people." Meyer v. Nebraska, 262 US 390, 402 (1923). We have been assured that students and teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Tinker, supra, at 505.

Although the Board claims that the judiciary, (and, presumably this Court,) "lacks expertise and training in the problems of operating public schools (Br. Pet. 9)," the Court has nonetheless been able to evaluate such integral parts of traditional education as curriculum offerings. Meyer, supra,

Bartels v. Iowa, 262 US 404 (1923), Pierce v. Society of Sisters, 268 US 510 (1925). The Court has found First Amendment protection for the criticisms of teachers and administrators within public educational systems. Keyishian v. Board of Regents, 385 US 589 (1967); Pickering v. Board of Education, 391 US 563 (1968). It has been observed, in the context of a case involving a public school teacher, that this Court has held that an opportunity for a fair adversary hearing must precede State action which would directly impinge upon interests of free speech or free press - even if the interest is not clearly protected under substantive First Amendment standards. Board of Regents v. Roth, 408 US 564, 575, ft. nt. 14 (1972).

This Court has continued to strongly affirm our national commitment to free expression and our national opposition to censorship; it has continued to be able to distinguish between claims of alleged disruptions of schools and the reality of First Amendment repressions which those claims represented. Police Department of Chicago v. Mosley, 408 US 92 (1972). Tinker, supra, has been reaffirmed as a "touchstone" which "made clear that school property may not be declared off limits for expressive activity by students..." Grayned v.

City of Rockford, 408 US 104 (1972). Distinguishing Adderley v. Florida, 385 US 39 (1966), the Court recognized Tinker's observation that "a school is not like a hospital or a jail enclosure." Tinker, supra, 393 US at 512, ft.nt.6, quoted at Grayned, supra, at 121 ft.nt 49.

The Board's argument concerning the alleged equating by the Seventh Circuit Court of Appeals of civil and criminal vagueness and overbreadth First Amendment tests does not, and should not, dispose of the lower court's decision concerning the Board's rules. This Court's continuing scrutiny of State attempts to curtail First Amendment rights does not lessen when the attempted suppression comes in an exclusively civil context - including protection for the advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. Communist Party of Indiana v. Whitcomb, US , 38 L.ed. 2d 635 at 642 (1974). Whether or not the Seventh Circuit is the only one in which it has been held that school regulations "must be equated to criminal statutes, (Br. Pet. 19)," it is clear that the Seventh is not the only Circuit to apply the First Amendment standards and tests utilized by the Court below in this case. The First Circuit, for example, in Riseman

v. School Committee of City of Quincy, 439 F.2d 148-150 (1st Cir. 1971) held that while a school may devise sensible rules governing the time, place and manner of distribution of literature, it could not constitutionally prohibit distribution of literature through the enforcement of vague rules. While Tinker itself did not speak in terms of vagueness and overbreadth, it nonetheless stands for the proposition that public school authorities must restrict First Amendment rights, if at all, in the most narrow and least restrictive fashion possible under the circumstances. Relying upon Tinker and our heritage of First Amendment cases, this Court recently affirmed its belief that the "vigilant protection of constitutional freedoms is nowhere more vital than in the community of American Schools." Shelton v. Tucker, 364 US 479, 487 (1960) quoted in Healy v. James, 408 US 169, 180 (1972). Recognizing Mr. Justice Rehnquist's observations in Healy, supra, at 202-203, it should be kept in mind that the facts of the instant case require more serious sanctions than abandonment of a "plan to meet in the college coffee shop." The Board is simultaneously asking this Court to reverse the Seventh Circuit and permit school authorities both prior censorship and a set of regulations which will have the net effect of destroying any non-official student publications.

Regardless of the terminology employed, the First Amendment policy which the Board wishes this Court to approve is diametrically opposed to its holding that "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate." Tinker, 393 US at 511. Indeed, it appears that the only way to accept the Board's position is through implicit or explicit overruling of Tinker. The Board candidly has argued that "since one function of elementary and even secondary education is indoctrinative - to transmit to succeeding generations the body of knowledge and set of values shared by members of the community - some measure of public regulation of classroom speech is inherent in the very provision of public education." (Br. Pet. 26). In the area of literature distribution, the entire thrust of the Board's position is, indeed, that its students should receive only that literature which it chooses to permit to be communicated. The indoctrinative approach requires "closed-circuit recipients."

The Board has contended that three reasons indicate why "criminal standards and processes" employed in the context of our criminal law should not be utilized in the academic community. (Br. Pet. 21). The reasons are as follows: (1) "Criminal law is designed for circumstances and ends

unrelated to the academic community"; (2) "It would frustrate the teaching process and render institutional disciplinary control impotent" if educators were required to utilize the "intricate, time-consuming, sophisticated rules, standards, procedures, or safeguards of criminal law"; and (3) "the reasons for which students may be lawfully disciplined or suspended from school are limited only by the varieties of misbehavior which their ingenuity can devise," and "therefore necessitate the use of encompassing words in conduct codes." (Br. Pet. 21).

A preliminary observation in response to these arguments is appropriate. Absolutely nothing has occurred in the course of this litigation to date which has resulted in the imposition on the Board of any "procedures" or "safeguards" of the variety found in criminal law. This litigation has not involved Due Process rights to fair hearings, notices, or any of the other procedural requirements which are familiar in the context of criminal law. It is also quite important to note that the statute cited on the page following the above quoted reasons (Br. Pet. 22), Ind. Ann. Stat. §28-5358, et seq., IC 1971 20-8.1-5-1 provides for an extremely elaborate procedural scheme which specifies limitations upon schools within which they may create additional regulations, provides grounds

for the expulsion of students, grounds for the exclusion and short term suspension of students, cites other disciplinary remedies, provides for certified or personal delivery of written recommendations and proposals by way of notice, the selection of impartial hearing examiners within carefully specified time limitations, rights of representation by counsel, cross-examination and the making of a permanent record of the proceedings, and it details an appellate procedure involving hearing committees, the board of the particular school corporation, and resort to the courts. Affirmance of the Seventh Circuit in these proceedings will in no way modify the procedural requirements with which the Board must already comply pursuant to state legislation, not court imposition. It should also be noted parenthetically that the civil proceedings utilized in adjudications of juvenile delinquency have, despite the complex objectives of the juvenile court, been subjected to many of the procedures and safeguards of criminal process. In re Gault, 387 US 1 (1967).

It is, therefore, clear that whatever differences might exist between the criminal law and the environment of public high schools, the State of Indiana has already seen fit to impose the kinds of procedures which the Board wishes to avoid, while nothing in this case will

affect the imposition of such procedures in any way. The first two reasons cited above by the Board therefore have no practical value in assessing the First Amendment questions in this case. The last reason - "the varieties of misbehavior which their ingenuity can devise" - is also effectively rebutted by the Indiana school disciplinary statute. In Ind. Ann. Stat. §28-5390c IC 1971 20-8.1-5-4, 12 subsections (themselves often containing numerous additional subdivisions) carefully outline the types of student conduct which shall constitute grounds for expulsion. The legislation constitutes a well-drafted enumeration of grounds which quite adequately cover the field. It must also be stressed, however, that this case is not about a wide spectrum of student misbehavior. We are here solely concerned with the distribution of a non-official student publication. The twin facts that the State of Indiana has successfully enumerated student conduct subjectable to sanctions, and the fact that we are only here concerned with one particular kind of conduct, both show that the reasons advanced by the Board for differentiating between criminal and civil standards in a First Amendment context failed to show any compelling reasons for reversing the courts below.

B.

1. Schools May Not Generally Prohibit Distribution of Non-Official Student Publications.

Chief Judge Steckler enunciated the basic point at which analysis of this question must begin: "No right is more clearly within the protection of the First Amendment, whose provisions Tinker v. Des Moines Independent Community School Dist., [citations omitted] has now extended to the public school, than the freedom to distribute printed matter." Jacobs v. Board of School Com'rs of City of Indpls., 349 F.Supp. 605, 609 (1972). The Board has recognized the validity of this holding, to an extent, in its rule 1.4 which exhorts school officials to "take care to insure that the constitutional and other legal rights of students to express themselves freely shall not be infringed." It therefore seems that our first point of analysis is not open to question - public high school students do indeed enjoy First Amendment protection which public schools may not subject to a general prohibition of non-official student publications.

2. The Special Characteristics of the School Environment Affect Student First Amendment Rights.

Plaintiffs have consistently recognized throughout this litigation the existence of legitimate considerations applicable to the school environment which make it differ from other environments. Tinker makes it clear that First Amendment rights are "applied in light of the special characteristics of the school environment..." Tinker, 393 US at 506. In the instant proceedings, for example, the District Court, in light of Fujishima v. Bd. of Education, 460 F.2d 1355 (7th Cir. 1972), recognized that a school district may lawfully establish a rule punishing students who publish and distribute on school grounds material which is obscene or libelous. Jacobs, 349 F.Supp. at 609. Plaintiffs have never challenged that proposition, nor have they ever argued for the proposition that the school was identical to the environment in other areas of the community.

The question which we face is not, therefore, whether the Board may constitutionally impose any restrictions on the First Amendment rights of its high school students. Rather, the genuine question is as follows: In support of its various rules concerning publications, what facts, what evidence has been shown by the Board that establishes "that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness

that always accompany an unpopular viewpoint...and...showing that engaging in ...the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school ...' Tinker, 393 U.S. at 509.

Plaintiffs believe that the Board has provided no facts which justify its various rules in the course of these proceedings, and its arguments show with equal clarity that it can offer at the very most only "undifferentiated fear or apprehension of disturbance..." Tinker, 393 U.S. at 508. In addition to the arguments under Section A above, we will now examine other reasons advanced by the Board in light of two general observations concerning their argument as a whole.

a. The Special Characteristics of the School Environment Require Greater Exercise of First Amendment Rights Than Many Environments in the Community at Large.

The thrust of the Board's argument distinguishing the high school environment from that of the community at large is all in one direction: greater repression of high school students'

First Amendment rights than would be tolerable for adults in the community at large. The Board has failed to recognize that in many instances, the school environment requires even more vigorous exercise of First Amendment rights than is permitted by adults in certain instances outside of the public high school. As we previously observed, Tinker recognized that a school is not like a hospital or a jail enclosure, and that accordingly it involved greater measures of expression. Tinker, 393 U.S. 512, ft. nt. 6. We submit emphatically that it is also not like the United States Army. Yet, not even the military can prevent First Amendment activity under all circumstances. Flower v. United States, 407 U.S. 197 (1972). If the Board's position is correct that there is a valid analogy between the principles applied in Parker v. Levy, U.S. , 41 L.Ed. 2d 439 (1974), (No. 73-206) and the facts of this case, they are clearly arguing that Tinker must be overruled. Tinker tells us that the "classroom is peculiarly the 'marketplace of ideas.'" Tinker, 393 U.S. at 512. Parker tells us that the Army "'is an executive arm' whose 'law is that of obedience.'" Parker, 42 L.W. at 4982, 4985 quoting In re Grimley, 137 U.S. 147, 153 (1890). And, the Board has submitted that this Court must assist it in prohibiting "students from turning the schoolhouse

into a literal marketplace..." (Br.Pet. 14).

The model of high school education which emerges from its brief is clearly one of obedience by students who are permitted only to engage in "supervised and ordained discussion in a school classroom." Tinker, 393 U.S. at 513.

It is significant that Tinker and Parker both grew out of reactions to the Vietnam War. In Tinker, black armbands were worn to exhibit opposition to our involvement in the war. Tinker, 393 U.S. at 510-511. In Parker, the court martialed captain's language and behavior were in opposition to the war. Parker, 42 L.W. at 4980-4981. The results in the two cases, however, are strikingly dissimilar.

b. Public High School Involves More Than the Development of Intellectual or Vocational Capacities of Students.

The Board's view of public high school education is not to be found in any particular location in its brief. We have commented above about the "indoctrinative" aspects of their view, but an additional aspect is to be found in

the statement that students are brought together "for the purpose of developing their intellectual or vocational capacities, which effort is distasteful to many and resisted by some." (Br.Pet. 23-24.) We submit that public high school education is considerably more than the sum of social indoctrination and development of intellectual or vocational capacities. Tinker found that "personal intercommunication among the students [citations and footnote omitted]" was a significant activity which could occur in the cafeteria, on the playing field, or on the campus during authorized hours. Tinker, 393 U.S. at 512-513. The Court there relied upon the concept that our nation's leaders need to be trained through wide exposure to a robust exchange of ideas which discovers truth "out of a multitude of tongue, [rather] than through any kind of authoritative selection." Tinker, 393 U.S. at 512 quoting Shelton v. Tucker, 364 U.S. 479 at 487 (1960).

Perhaps the most searching examination of the purposes of public education undertaken by this Court was that in San Antonio School District v. Rodriquez, 411 U.S. 1 (1973). The Court found that education presents a myriad of "intractable economic, social, and even philosophical problems." Rodriquez, 411 U.S. at 42 quoting Dandridge v. Williams, 397 U.S. 471 at 487 (1970).

Most significantly, the Court made the following observation: "Related to the questioned relationship between cost and quality is the equally unsettled controversy as to the proper goals of a system of public education. [footnote omitted]" Rodriquez, 411 U.S. at 43. This Court need not commit itself to any particular view of the goals of public education to decide this case, but it would be especially damaging to the future of public education if it were to accept the constricted model offered by the Board.

c. The Board Has Failed to Show More Than an Undifferentiated Fear or Apprehension of Disturbance.

Plaintiffs voluntarily ceased distribution of their non-official student publication after they first learned of the existence of the Board rules which led to the institution of these proceedings. At the time they took it upon themselves to determine what was required of them under school rules, they had distributed four issues in toto, and they were beginning to distribute the fifth. When they voluntarily terminated distribution, no school official or teacher had requested that they stop distributing the publication, nor

had any of them been subjected to disciplinary sanctions for such distribution. The record shows no disturbance of any kind at any public school at any time during which the CCC was distributed. The facts in this case show even less justification for the Board rules in question than the facts in Tinker showed for the actions there taken by school officials. Indeed, at the time of the promulgation of all of the Board rules currently before this Court, plaintiffs were continuing to voluntarily refrain from distributing their publication. Each of the rules now in question was adopted in a relative vacuum, and not in response to any behavior by the plaintiffs except for the institution of this litigation. Cf., Rule adoption in Sullivan v. Huston Independent School Dist., 475 F.2d 1071 (5th Cir. 1973).

Of singular interest is the fact that the Board relies upon "vivid imagination" and two lower court cases which held that the absence of actual disturbance to the schools in question was immaterial. (Br.Pet. 39-40). One of those two cases upon which the Board has relied, Cloak v. Cody, 326 F.Supp. 391 (N.D.N.C. 1971), was vacated and dismissed as moot. Cloak v. Cody, 449 F.2d 481 (4th Cir. 1971). The other case, Katz v. McAulay, 438 F.2d 1058 (2nd Cir. 1971), cert. den., 405 U.S.

933 (1972), involved a solicitation of funds to pay for legal fees and transcripts on behalf of eight defendants who were on trial in federal court. The solicitation, therefore, was not for the incidental expenses incurred in publishing a non-official student newspaper. Rather, it was a solicitation for money contributions to an outside organization, and evidence was received in the case indicating that from seventy-five to one hundred requests to use school property for the solicitation of funds had been denied over a period of a dozen years by the school in question. The one page leaflet the students distributed in that case was essentially a solicitation for money contributions, and it was clearly not comparable to the CCC as a student newspaper.

The Board's reliance upon Katz and Cody is, to reiterate, an implicit admission of the lack of evidence of disruption of any kind in the instant case. In the absence of such evidence, the Board has alleged various harms throughout its brief which allegedly might result from permitting the distribution of a publication such as the CCC. They should not be permitted, however, to gloss over the fact that none of the alleged harms could be demonstrated despite distribution of the publication over a period of almost one year. In spite of that unavoidable

fact, the Board has alleged the following, speculative problems which they allege result whenever a publication such as CCC is permitted to be distributed in public high schools:

1. "If any student is disciplined for flagrant violation of a Board rule or wishes to challenge a Board rule, then under the Court's method of review of the regulation, if the student or Court could suggest hypothetical impermissible applications of the rule, it would be declared void on its face and the student could escape any punishment even if his own conduct was not privileged or protected." (Br.Pet. 9)

2. "Schools also have an interest in protecting the safety and well-being of its students and in identifying students who abuse their freedoms and harm others through the use of fraud, libel and obscenity." (Br.Pet. 13) "To prohibit students from turning the schoolhouse into a literal marketplace; to prohibit them from delaying or disrupting classwork by forbidding distribution while classes are in session which all are required to attend; to prohibit significant distuptions; to prohibit students from becoming the tools of outsiders who seek to reach a vulnerable captive audience in schools; to prohibit anonymity so that those responsible for abuses may be identified

..." (Br.Pet. 13-14).

3. "Because students and teachers cannot easily disassociate themselves from expressions directed towards them on school property, because of the pressures upon children of multiple sales and solicitations, because students are so easily distracted from their tasks and must learn self-restraint, because disciplinary problems in such a populated and physically confining setting seriously sap the educational process and because teachers and administrators have the vital responsibility of compressing a variety of subjects and activities in a relatively confined period of time and space..."

4. "The distribution in school of the Corn Cob Curtain was prohibited because it contained obscene, filthy, indecent and defamatory language and cartoons which school officials believed were harmful to minors, and would impede and obstruct substantial educational goals."

5. "[O]ne of the basic functions of our schools is to teach children self-discipline and to express themselves properly in acceptable, civil terms..." (Br.Pet. 16).

6. "[C]hildren would lose respect for a school which tells children that

such language is improper but allows them to freely distribute it in school. Children are harmed by such inconsistencies and are also harmed by being exposed to such language at school." (Br.Pet. 16).

7. "Such language is inherently distractive and disruptive and is scarcely conducive to maintaining an academic atmosphere and a level of decency necessary for learning to take place." (Br.Pet. 16-17).

8. "It does not require a vivid imagination to visualize the type of atmosphere and discipline that would prevail in primary and secondary schools if children at school were permitted with impunity to mock and ridicule their teachers and one another, use filthy, profane or obscene language, urge others to disobey their teachers, school rules, or the law, conduct commercial activities, and anonymously write falsehoods, thereby causing a delay of schoolwork, distractions, disruptions, or violence." (Br. Pet. 26.).

9. "If the Board rules are held unconstitutional by this Court, the elementary and secondary schools will not be able to maintain even a basic level of decency, order and discipline necessary to obtain the academic atmosphere essential for learning." (Br.

Pet. 26).

The quotations above are a sample of common themes found in the Board's brief. It must again be stressed that almost none of them is founded upon any evidentiary showing of any kind, including even the abstract comments of Dr. Karl Kalp who offered his personal opinions which were of the most speculative and general variety imagineable. (App. 43 et seq.).

Several additional responses are appropriate to demonstrate that the nine quotations above do not constitute reasons why this Court should reverse those below. In addition to presenting a parody of the judicial process, the first quoted reason above fails to recognize that these proceedings do not involve general principles which would support flagrant violations of board rules. These proceedings involve a fundamental First Amendment right, and while plaintiffs do not accept the suggestion that "hypothetical impermissible applications" of rules have been involved in these proceedings, it is clear that hypothetical applications can be appropriate in First Amendment decisions. See, e.g. Gooding v. Wilson, 405 U.S. 518 (1972), Coates v. City of Cincinnati, 402 U.S. 611 (1971).

The second quotation above is

one out of three formulations alleging a variety of dire results unless the Board position is accepted. The other formulations are found in the third and eighth passages quoted above. It cannot be too strongly stressed that none of the dire consequences has apparently befallen the Board in the nearly two years since it was enjoined from enforcing the rules in question. The Board has not sought the opportunity to provide a supplementary evidentiary showing. It has not sought to modify the District Court's order despite a clear invitation to do so by the Seventh Circuit. Plaintiffs' contention in this regard should not be brushed lightly aside. The Board should be required to substantiate in some reasonable fashion its forecasts of extreme and serious consequences flowing from the distribution of CCC.

The Board should also be called to account for the rather casual usage of allegations against the plaintiffs which find no support of any kind in the evidence. There exists, for example, the clear implication in the second quoted passage above that some evidence involving "the use of fraud" can be found in these proceedings. There is the suggestion of "delaying or disrupting classwork" with no evidence to support it. There is a continuing intimation that the plaintiffs are responsible for libel, or "false-

hoods," but it should be noted that argument on that subject has been almost totally dropped at this stage of the proceedings. There are allegations of "students...becoming the tools of outsiders..." without any supporting evidence.

In the third quoted passage above, one comment particularly requires a response. We are told that students "must learn self-restraint", but we are led to conclude that they can only do so by being shielded from publications such as CCC. It is self-evident that people do not learn self-discipline in an environment in which all of their choices are controlled for them by others.

The fourth quoted section above shows the lack of evidence in these proceedings because it admits that the reason distribution of CCC was prohibited was because "school officials believed [it was] harmful to minors, and would impede and obstruct substantial educational goals." The only school official who apparently held such a belief, however, was Superintendent Kalp who discussed the matter entirely in retrospect. Mr. Wally Potter, an administrator at one of the Indianapolis high schools, had the opportunity to suppress the publication long before the students

voluntarily terminated distribution, but he was of the opinion that school interests were better served by not taking such action. (App. 52).

The sixth and seventh quoted passages above, if accepted, would place public relations above the First Amendment. Once again, there is no evidence of any kind that children were harmed by the publication, that they would be harmed "by such inconsistencies" as would theoretically result from teaching certain kinds of communication while students were permitted to distribute communications of their own which differed only in the utilization of a handful of words. It should be added that the Board also argued that a correlative reason for action by this Court is that parents would also lose respect for a school in which a publication such as CCC was permitted to be distributed. (Br.Pet. 16). All of these alleged reasons are apparently founded upon remarks by Dr. Kalp. Those remarks, it should be noted, were premised upon distribution of CCC with the "approval" of the administration. He also indicated that teachers and administrators had been "negatively impressed" by CCC. (App. 51-52).

The last section quoted above is basically a reiteration of many others, but the Board should be required to

demonstrate that it has not been "able to maintain even a basic level of decency, order and discipline necessary to obtain the academic atmosphere essential for learning" during the lengthy period of distribution of CCC prior to this litigation, and during the two years since the Board was enjoined from enforcing the rules here in question. The burden of proof for such extravagant claims cannot be sustained by the conjectural opinion testimony of Dr. Kalp.

ARGUMENT II

A.

Rules 11.06 and 11.05, Section 1.3. 1.5, Of The Policies and Regulations Of The Board Of School Commissioners Of The City Of Indianapolis, Which Prohibit The Sale, Solicitation and Receipt of Contributions By Public High School Students Who Distribute The "Corn Cob Curtain", A Student Publication, On, In Or About Public Schools, Contravene The Rights Of Public High School Students To Freedom Of The Press, Speech, And Expression.

1.

Sales and Contributions on School Property

Rules 11.06 and 11.05, Section 1.3.1. 5, of the Policies and Regulations of the Board of School Commissioners of the City of Indianapolis (App. 24-26) were adopted by the Board in compliance with the district court's order of September 29, 1972 (App. 2). Reading these rules in the complete context in which they appear, it is evident that the Board is seeking to accomplish indirectly that which they cannot accomplish directly, to-wit: prohibition of the distribution and sale of the "CCC", a student publication, by the imposition of prior restraints upon the exercise of First Amendment rights possessed by the students in this action.

Relying upon Adderley v. Florida, 385 U.S. 39, 47 (1966), the Board argues that it may prohibit use of school property for non-school purposes (Br.Pet. 30). In Adderley, though, this Court upheld a conviction for "trespass with malicious intent" where the defendants conducted a demonstration on jail grounds and refused to leave when ordered by the Sheriff. The critical fact in Adderley was that the jail premises was reserved for the purpose of transporting prisoners to and from the jail and for commercial concerns

servicing the jail. This Court then held that jail premises constituted a type of public property that was subhect to different rules regarding its use for First Amendment activities than are for example, parks, Hague v. CIO, 307 U.S. 496 (1939); public streets, Cox v. Louisiana, 379 U.S. 536 (1965); or state capitol grounds, Edwards v. South Carolina, 372 U.S. 229 (1963). In Grody v. State, 278 N.E.2d 280 (1972), the Supreme Court of Indiana, invalidating a statute which made it a misdemeanor for any person to refuse to leave the premises of any educational institution when requested regardless of the reason therefor, similarly distinguished Adderley, stating that:

> "From the standpoint of the latitude to be allowed in the exercise of First Amendment rights it is hard to conceive of anything more unlike a jail and its environs than a college campus. A jail is the epitome of security and regimentation while a college truly thrives only when it fosters open debate and principled dissent to the conventional wisdom of the day. The exercise of First Amendment rights is inevitably going to be an integral part of such an environment." 278 N.E.2d at 284.

While the Grody court held that "the State can by specific and narrowly

drawn rules regulate the time, place, duration and manner of use of the various types of school property to further the ends of education", it qualified that statement explaining that "the very attainment of those ends requires an assured freedom to speak and publish ideas and to assemble to discuss them ... That freedom is gone if it exists only at the whim of certain officials." (Emphasis added) Id.

Contrary to the Board's assertion that public school premises were being used for the personal profit of students and for commercial purposes (Br. Pet. 30-31), no facts were presented at trial which even indirectly showed the realization of personal profit by the student journalists or the presence of a commercial purpose. The cost of publishing an issue of the "CCC" was estimated to be approximately $150 (Tr. 166) in addition to which the "CCC" incurred expenses for rental of a post office box at $7.00 per quarter-year, for photography and travel (Tr. 164). Indeed, the "CCC" fell short of needed funds, requiring personal expenditures and contributions from the student publishers to continue publication (Tr. 161-162). Characterizing the publication, distribution and sale of the "CCC" as a "commercial" activity in order to justify its suppression is without foundation.

The effect of Rules 11.06 and 11.05, Section 1.3.1.5, is to limit student communication, confining expression only to those receiving approval, by prohibiting secondary school students from receiving voluntary contributions or selling the "CCC".

Decidedly the secondary school student publishers needed money to print and publish the "CCQ". The obvious source of such funds was through the sale of the publication and/or through the receipt of voluntary contributions from other public high school students either before, during or after school hours. (App. 28-29, 41; Tr. 145, 148, 341). Teachers, administrators and policemen also gave voluntary contributions for copies of the "CCC" distributed by plaintiff Chandler (Tr. 245). Without the opportunity to sell the "CCC" or to seek voluntary contributions for it from other students in the public high schools of the City of Indianapolis, secondary public school students would be prohibited from expressing their views and from fully exercising their right to freedom of the press and of speech. Thus, if the plaintiffs were merely permitted to distribute copies of the "CCC" without the related right to obtain voluntary contributions or to sell the publication, the rights of freedom of speech, press and expression would exist in principle but not

in fact. Tinker, supra, at 513.

This Court has repeatedly invalidated regulatory measures which restricted circulation of publications or which tended to destroy newspaper circulation. Grosjean v. American Press Company, 297 U.S. 233, 244, 250 (1935). "Liberty of circulating is as essential to that freedom (of the press) as liberty of publishing; indeed, without the circulation, the publication would be of little value," Lovell v. Griffin, 303 U.S. 444, 452 (1937); Ex parte Jackson, 96 U.S. 727, 733 (1917); Near v. Minnesota ex rel. Olson, 283 U.S. 697, 716 (1930). In Near this Court found that suppression of a newspaper was accomplished by enjoining publication and that restraint was the "object and effect" of the statute under scrutiny, 283 U.S. at 712. In this case, the "object and effect" of Rules 11.06 and 11.05, Section 1.3.1.5, is to restrain and suppress sale and distribution of the "CCC". Simply because secondary public school student newspapers "are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment," Time v. Hill, 385 U.S. 374, 397 (1967) quoting Burstyn v. Wilson, 343 U.S. 495, 501-502 (1951). This Court has also stated that "(t)he right to use the press for expressing one's views is not to be

measured by the protection accorded commercial handbills. It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge," Murdock v. Pennsylvania, 319 U.S. 105, 111 (1942) for certainly freedom of speech, freedom of the press are available to all, not merely to those who can pay their own way. Id.

In Murdock the petitioners sold certain religious publications at twenty-five cents each, accepting lesser sums or even donating the publications to interested persons without funds. The same manner of sale was utilized in the case now before this Court. As in Murdock, "(i)t is a distortion of the facts of the record to describe their activities as the occupation of selling books and pamphlets," 319 U.S. at 111. Conclusively, characterization of the "CCC" as a commercial activity is unsupported by the record. Instead, the "CCC" must be acknowledged to be a legitimate exercise of freedom of the press, vitally serving the basic purposes of the First Amendment. For without an informed and free student press in the public secondary schools, there cannot be an enlightened student body. New York Times Co., supra, 403 U.S. at 713. Accordingly, the Board may not absolutely prohibit the sale, solicitation and receipt of voluntary contributions by public secondary school students who distribute

the "CCC".

2.

Substantial Justification Supportive of a Compelling Legitimate State Interest Affirmatively Established vs. mere "reasonableness"

Oversimplifying its justification for retaining the subject rules as merely being "reasonable", the Board omitted any affirmative evidentiary showing at the trial level that the receipt of voluntary contributions or funds from the sale of the "CCC" would "materially and substantially disrupt the work and discipline of the school," Tinker, supra at 513, 514. In this regard it is important to note that four (4) issues of the "CCC" were distributed in the Indianapolis public high schools for which the student publishers and distributors received monies from sales and voluntary contributions prior to the ban against distribution and sale of the fifth issue of Volume I. (Tr. 149, 244). The Board failed to establish any material or substantial disruption with the work and discipline of the public high schools as a direct result of the sale of the "CCC".

The only explanation offered by the Board for prohibiting sale of the "CCC"

or for prohibiting the receipt of voluntary contributions for the "CCC" was the testimony of Superintendent Kalp who stated salesman frequented school campuses for the purpose of selling items to either members of the faculties or to students which Kalp, in his opinion, stated should be limited as necessary for the continuing function of education (App. 43). In other words, defendant Kalp did not indicate the presence of any disturbance or disorder directly attributable to the sale and distribution of the "CCC"; in fact, Mr. Kalp relied solely upon conjecture, speculation and apprehension for his absolute prohibition against sale or distribution of the "CCC". In light of Tinker, supra at 508, such justification is insufficient to warrant suppression of First Amendment rights.

"Reasonableness" alone, as advocated by the Board, is an insufficient basis for restricting or burdening the exercise of First Amendment rights by public high school students. The breathing space required by the First Amendment requires that regulatory restrictions be narrowly drawn, Broadrick v. Oklahoma, 413 U.S. 601, 611-612 (1973) rather than impermissably overbroad (supra, Argument IA) so as to prevent a "chilling effect" on protected expression, Broadrick, supra at 630 (dissenting opinion). Rules 11.06 and 11.05,

section 1.3.1.5, substantially (in fact, absolutely) restrict the students' freedom of the press by preventing any form of sale and/or receipt of voluntary contributions, thereby precluding circulation and existence of the "CCC".

Under the guise of "maintaining order and decorum within the educational system" (Br.Pet. 31), the Board is attempting to abrogate First Amendment guarantees in the absence of a legitimate substantial compelling state interest. Tinker, supra; Antonelli v. Hammond, 308 F.Supp. 1329, 1336-1337 (D.Mass. 1970). The Board's reliance upon the district court's opinion in Cloak v. Cody, 326 F.Supp. 391 (N.D.N.C. 1971), vacated, 449 F.2d 781 (4th Cir. 1971) is misplaced as is its reference to Katz v. McAulay, 438 F.2d 1058, 1061 (2d Cir. 1971), cert. denied, 405 U.S. 933. Readily distinguishable, Katz involved solicitation by secondary school students who distributed leaflets prepared by an external nonstudent organization seeking funds for defense expenses of eight persons in a criminal proceeding. More applicable is Scoville v. Bd. of Ed. of Joliet Tp. H.S. Dist. 204, etc., 425 F.2d 10 (7th Cir. 1970), cert. denied, 400 U.S. 826 (1970), which indicates, by implication, the right of public high school students to sell a student publication in a public high school. In Scoville the students had

sold 60 copies of a student publication entitled "Grass High" at Joliet Central High School for which they were expelled. Reversing the dismissal of the complaint by the district court, the appellate court found that the "Board could not have reasonably forecast that the publication and distribution of this paper to students would substantially disrupt or materially interfere with school procedures," 425 F.2d at 15, concluding that the plaintiffs were entitled to the declaratory, injunctive and damage relief sought. Simply stated, the students were permitted to continue sale of the student publication in the public high school. A similar result is compelled in the case at bar inasmuch as neither the Board nor the administrators could have reasonably forecast that the publication and distribution and sale of four (4) prior "CCC" issues of Volume I , See, Fujishima v. Board of Education, 460 F.2d 1355 (7th Cir. 1972) , would cause substantial disruption.

Conclusively, Rules 11.06 and 11.05, Section 1.3.1.5 constitute impermissible prior restraints of an overly broad nature which directly contravene plaintiffs' rights to freedom of speech, expression and press as guaranteed by the First Amendment. Organization For A Better Austin v. Keefe, 402 U.S. 415, 419 (1971); accord, Sullivan v. Houston Independent School District, 333 F.Supp.

1149, 1162 (S.D.Texas 1971) (Blanket prohibition of all sales irrespective of disruption is not a legitimate exercise of the Board's power to regulate the time, place and manner of distribution); see, Riseman v. School Committee of City of Quincy, 439 F.2d 148-150 (1st Cir. 1971) (school may devise sensible rules governing the time, place and manner of distribution of literature but may not prohibit distribution through enforcement of vague rules when applied to First Amendment activities).

Accordingly, this court should affirm the decisions below holding rules 11.06 and 11.05, Section 1.3.1.5, unconstitutional.

B.

In The Absence Of Explicit Definitions or Procedures By Which To Determine a Likelihood of Disruption, Rule 11.05, Section 1.1.1.3 Is Unconstitutionally Vague and Over-Broad.

Rule 11.05, section 1.1.1.3, (App. 23) boldly prohibits the distribution of literature "that is either by its content or by the manner of distribution itself, productive of, or likely to produce a significant disruption of the normal educational processes, func-

tions or purposes in any of the Indianapolis schools, or injury to others." Ostensibly extrapolated from terminology in Tinker, supra, although taken out of context, it is the operation and effect of the regulation which is controlling. As stated in Near, supra, 283 U.S. at 709:

> "...in passing upon constitutional questions the court has regard to substance and not to mere matters of form, and that, in accordance with familiar principles, the statute must be tested by its operation and effect (citations omitted)."

See, Robinson v. American Broadcasting Companies, et al., 441 F.2d 1396, 1400 (6th Cir. 1971).

The operation and effect of Section 1.1.1.3 is to subject the "CCC" to the prior review of the Board, a review which is made pursuant to a vague, overbroad prohibition regulation. Should the plaintiffs, public high school students, violate Section 1.1.1.3 they may be suspended or expelled, a severe punishment indeed but for precisely what?

While lack of precision is not itself offensive to the requirements of due process, "...the Constitution does not require impossible standards;" all

that is required is that the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." United States v. Petrillo, 332 U.S. 1, 7, 8 (1946); accord, Roth v. United States, 354 U.S. 476, 491 (1957). The question thus becomes "...whether the contested section is written so vaguely and indefinitely that one whose conduct it affected could only guess what it meant." Petrillo, supra, 332 U.S. at 6.

In the case before this Court the plaintiffs would have to engage in pure conjecture and speculation to attempt to ascertain any precise meaning of that portion of Section 1.1.1.3 which reads:

> "No student shall distribute... any literature that is either by its content or by the manner of distribution itself, productive of, or likely to produce...injury to others (emphasis supplied)."

Assuming, arguendo, that the "CCC" exposed discriminatory conduct or was critical of class scheduling or substantive class content, it is readily apparent that such exposure or criticism could justifiably "injure" others. The "injury" could occur by way of official sanction or

through subtle pressures and criticisms to make changes. Indeed, the term "injury" enables the defendants to act arbitrarily without notice to the plaintiffs of exactly what "injury"[1] is prohibited. The rule applicable to such

---

[1] Defined in Webster's New International Dictionary of the English Language, 1280 (2d unabr. ed. 1950)

injury

1. Damage or hurt done to or suffered by a person or thing; detriment to, or violation of, person, character, feelings, rights, property, or interests, or the value of a thing.

2. An act which damages, harms, or hurts; as an injury to the feelings; slander is an injury to the character; also, a hurt or damage sustained; as, they suffered severe injuries.

3. Abusive or offensive speech; an insult. Obs.

4. Law. An actionable wrong; that is, any violation of another's rights for which the law allows an action to recover damages or specific property, or both. Cf. TORT.

situations of indefiniteness was stated in Winters v. New York, 333 U.S. 507, 509, 510 (1948) to be:

> "It is settled that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment" (citations omitted). "A failure of a statute limiting freedom of expression to give fair notice of what acts will be punished and such a statute's inclusion of prohibitions against expressions, protected by the principles of the First Amendment, violates an accused's rights under procedural due process and freedom of speech or press."

See, Grayned, supra, 408 U.S. at 108-109. Considering the fact that the content of the "CCC" or that of any other student publication may injure the feelings of others or be insulting (sometimes justifiably so) because of the unorthodox or opposing views contained in the student publication, it could be judged injurious to the emotions, egos or interests of individuals and, by the terms of Section 1.1.1.3, be prohibited from the public high schools because of the presence of an

"injury." Certainly, this unjustifiable prohibition based upon a vague rule would stifle discussion as well as the free exchange of ideas and opinion,[2] leading to an unconstitutional restraint.

---

[2] Stromberg v. California, 283 U.S. 359, 369, 75 L.Ed. 1117, 1123, 51 S.Ct. 532, 73 A.L.R. 1484 (1930) emphasized the necessity of maintaining an opportunity for free political discussion:

> The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the 14th Amendment.

see, Herndon v. Lowry, 301, U.S. 242, 81 L.Ed. 1066, 57 S.Ct. 732 (1936); Connally v. General Construction Co., 269 U.S. 385, 393, 70 L.Ed. 322, 329 (1926).

In this case the Board completely failed by any affirmative evidentiary showing to justify imposition of Rule 11.05, Section 1.1.1.3 as required in Scoville, supra, 425 F.2d at 13, or Tinker, supra. The "substantial burden of justification" Crews v. Cloncs, 432 F.2d 1259, 1265 (7th Cir. 1970); Breen v. Kahl, 419 F.2d 1034, 1037 (7th Cir. 1969) which is required of the Board to support the rule thus remained unsatisfied. Decidedly, Rule 11.05, Section 1.1.1.3, viewed in its operation and effect, is an unconstitutional prior restraint, the impermissibility of which is emphasized by its vagueness (see Argument IA, supra) and underscored by the absence of substantial justification.

The Board's assertion relating to civil-criminal overbreadth and vagueness distinctions, hereinbefore discussed in Argument IA, is unmeritorious. The divergent innumerable interpretations to which the subject rule may be applied fails to explicitly define that which is "likely to disrupt"; indeed, no procedures exist to make such a determination. Posing as an innocuous "distribution rule", section 1.1.1.3 effectively chills freedom of the press, suppressing publication while abrogating fundamental constitutional guarantees. Even assuming, arguendo, validity of the rule, no evidence was introduced

to establish any substantial disruption of the educational processes, Fujishima, supra, 460 F.2d at 1358, during the time in which the "CCC" was distributed.

Scrutinized by the Court of Appeals (Pet.App. 20-22), 490 F.2d at 605-606, the rule was properly held to be vague and overbroad.

C.

Rule 11.05, Sections 1.1.1.4 And 1.3.1.6 Of The Policies And Regulations Of The Board Of School Commissioners Of The City Of Indianapolis Which Prohibit Distribution Of Student Publications In Public High Schools Which Are Not Entirely Written By Students Or School Employees And Which Further Require All Contributors To Be Named, Contravene And Violate The First Amendment Rights Of Public High School Students To Freedom Of Press, Speech And Expression.

1.

Articles May Be Written By Non-Students

Acknowledging that "(a)ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity," New York Times Co. v. United States, 403 U.S. 713, 714 (1971); Bantam Books,

Inc. v. Sullivan, 372 U.S. 58, 70 (1963), it is interesting to note that Rule 11.05, Sections 1.1.1.4 and 1.3.1.6 (App. 23-24), by controlling who can write for a student publication and by requiring disclosure of the names of authors imposes impermissibly overbroad prior restraints upon the exercise of plaintiffs' First Amendment rights. Attempting to regiment and stagnate thought and expression, the Board and school officials by its Rules have sought to impose "orthodoxy over the classroom", Keyishian v. Board of Regents, 385 U.S. at 603, through "authoritative selection", if not suppression, rather than heed the admonitions that "(t)he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools," Shelton v. Tucker, 364 U.S. at 487 (1960); which may not be enclaves of totalitarianism," Tinker v. Des Moines Community School Dist., 393 U.S. 503 (1969). Board Rule 11.05, Sections 1.1.1.4 and 1.3.1.6, which dictates to the "CCC" those who can participate in writing for the publication unconstitutionally regulates the content of the student publication by excluding articles written by nonstudents or persons other than school employees and by precluding anonymous "letters to the editor", Papish v. University of Missouri , 410 U.S. 667 (1973). No longer immune from the sweep of the First Amendment, Healy v. James, 408 U.S. 169, 180 (1972), as argued by the Board which alleges that it has

"discretion to prohibit the use of its schools for student distribution of literature written by non-students or other persons not connected with the school" (Br. Pet. 49), the Board may not, except for time, place and manner, restrict student distribution of an unofficial student newspaper because of its message, its ideas, its subject matter or its content. Police Department v. Mosley, 408 U.S. 92, 95 (1972). The Board's reliance upon Antonelli v. Hammond, 308 F. Supp. 1329, 1336-39 (D. Mass. 1970) is misplaced, expecially since that Court held that there is "no right to editorial control by administration officials" of a college sponsored and state supported newspaper while invalidating prior submission restraints upon First Amendment rights of students.

Analysis of Section 1.1.1.4, even when most liberally interpreted, reveals an overbroad, impermissible prohibition against articles written by legislators, attorneys, educators not employed by the Board, and even members of this Court, from appearing in an unofficial student newspaper. Further, the Constitution, the Bill of Rights, Acts of Congress and judicial opinions may not appear in the "CCC" for, certainly, none of these were written by students, teachers or other school employees of the Indianapolis Public Schools. Indeed, even alumni of the Indianapolis Public Schools (App. 27) are precluded from contributing literary articles to the "CCC" by reason of rules which control the

influx of information, stifle inquiry and stagnate thought, while abrogating expression of ideas: suppression of First Amendment guarantees in its most heinous, intolerable form. In Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957), this Court observed that:

> "Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."

The guaranteed right of the people to express any thought free from government censorship and content control preserves our national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, Mosley, supra, 408 U.S. at 96, New York Times Co., supra, at 270. The Board, though, seeks to view students as "closed circuit recipients of only that which the State chooses to communicate", a concept repudiated in Tinker, supra, at 511, wherein this Court stated that students "may not be confined to the expression of those seniments that are officially approved." The inescapable result of Rule 11.05, Section 1.1.1.4 is to restrict the content of the "CCC" by prohibiting articles written by non-students. The "CCC" serves the students, not the Board, fulfilling its role as part of the free press, New

York Times, supra, 403 U.S. at 717, while asserting an "equality of status in the field of ideas," A. Meiklejohn, Political Freedom: The Constitutional Powers of The People 27 (1948), providing factual reality to the principle of free speech and expression, Tinker, supra, at 513. Decidedly, exposing students to ideas and thoughts from guest writers, prominent community members, alumni and others which may not be harmonious with those of the Board is one of the purposes of the "CCC"; in fact, of any publication. The undifferentiated, hypothetical and conjectural apprehensions of the Board and school officials, supported only by speculation, cannot justify imposition of prior restraints which chill, if not relegate to impotence, First Amendment rights. As such, Rule 11.05, Section 1.1.1.4 must be held unconstitutional.

2.

A Rule Requiring Disclosure of Publication Participants Is Invalid.

Rule 11.05, Section 1.3.1.6 (App. 24) which, of necessity, must be read in the complete context of Rule 11.05, unconstitutionally prohibits distribution of "distributable literature" (App. 23) "unless the name of every person or organization that shall have participated in the publication of the distributable literature is plainly written in the distributable literature itself." Initially, it must be

observed that most, if not all, daily newspapers, weekly magazines and other periodicals such as the New York Times, Washington Post, Indianapolis Star and Indianapolis News, among others, contain articles or "letters to the editor" which do not disclose the name of the author. It is incredulous that the Board seeks to impose upon the "CCC", or any other student publication, such dictatorial prior restrictions which are absent from newspapers, periodicals and magazines which are equally available to the students. The "chilling effect" on free expression feared in Dombrowski v. Pfister, 380 U.S. 479 (1965) is almost certain to occur once creative writing is imperiled, Time v. Hill, 385 U.S. 374, 398 (1967) (concurring opinion).

The Board argues that its "vulnerable captive audience" of public high school students should be shielded from advocacy or promotion of expressions of feelings with which they do not wish to contend, a concept specifically renounced in Tinker, supra, at 511; Burnside v. Byars, 363 F. 2d 744, 749 (5th Cir. 1966). Evidently, the Board is oblivious to the principle that "the constitutional guarantees of free speech and free press do not permit a state to forbid or prescribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action", Communist Party of Indiana v. Whitcomb,

___ U.S. ___, 38 L. Ed. 2d 635, 642 (1974). Moreover, an abstract teaching or written statement concerning the moral propriety or moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." A school rule or regulation, such as the one before this Court, which fails to distinguish between abstract advocacy and imminent steeling to action impermissibly intrudes upon fundamental First Amendment freedoms, sweeping within its condemnation speech, immunized from governmental control by our Constitution.[2] Brandenburg v. Ohio, 395 U.S. 444 (1969); Communist Party of Indiana, supra, at 642. Application of these fundamental principles to the case at bar compels a

---

[2]This principle has been applied to statutes which directly forbid or proscribe advocacy, see, Scales v. United States, 367 U.S. 203 (1961); Noto v. United States, 367 U.S. 290 (1961); Yates v. United States, 354 U.S. 298 (1957), to regulatory schemes that determine eligiblity for public employment, Elfbrandt v. Russell, 384 U.S. 11 (1966); Cramp v. Board of Instruction, 368 U.S. 278 (1961), and to moral fitness justifying disbarment, Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).

rejection of the Board's speculative fear of advocacy, especially where no evidence was introduced at the trial which established advocacy of criminal activity (Br. Pet. 52) directed to producing imminent lawless action. Accordingly, the Board's argument in support of Rule 11.05, Section 1.3.1.6 is without merit.

Board members, school administrators and staff members, as public officials in the public secondary school setting, are constantly in the public view of students, parents and the community at large, and are often the subject of articles and editorials contained in school sponsored newspapers as well as newspapers of general circulation. As observed in Time, supra, at 388:

> "Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and press."

Irrespective of the characterization of a newspaper as being one of general circulation in the community, a school sponsored paper or an unofficial student publication, a broadly defined freedom of the press assures the maintenance of our political system and an open society, including the political

and societal secondary school microcosm, Time, supra, at 389, in which students have a legitimate and substantial interest. Rosenbloom v. Metromedia, 403 U.S. 29, 42 (1971); Curtis Publishing Co. v. Butts, 388 U.S. 130, 163-164 (1967) (Warren, C.J., concurring in result). The long-standing principle that freedom of the "press, in its historic connotation, comprehends every sort of publication which affords a vehicle of information and opinion" must be held to encompass unofficial student publications such as the "CCC". Lovell v. Griffin, 303 U.S. 444, 452 (1937); Branzburg v. Hayes, 408 U.S. 665, 704 (1972); Mills v. Alabama, 384 U.S. 214, 219 (1966).

Although the Board argues that Section 1.3.1.6 is necessary because "anonymous persons responsible for this newspaper" are not disclosed (Br.Pet. 52), the evidence at trial (App.6,28-30) directly refutes such an assertion; in fact, review of the "CCC" (Pl. Exh. 1-5) clearly discloses the use of bylines in most articles. Compounding the illogical justification advanced by the Board is its claim of vicarious tort liability for libel for a publication having no school financial or administrative support, and therefore no reasonable basis upon which to premise liability, if any exists. Most alarming, though, is the Board's

misleading statement that "the Rule does not impose any prior restraints and places no restrictions upon what can be said, where it can be said or when it can be said" (Br. Pet. 52). Scrutiny of Rule 11.05, which must be read in its entirety, discloses a vague, overbroad, impermissible definition of "distributable literature" (Argument I, supra), which regulates distribution as to time in an unspecified, overbroad manner in Section 1.1.1.3, prohibits content by restricting outside authors in Section 1.1.1.4, and effectively precludes distribution by prohibiting either sale or receipt of voluntary contributions in Section 1.3.1.5 (Argument 2a, supra).

Failure to strictly comply with Section 1.3.1.6 may result in suspension or expulsion (App. 25), unduly chilling the exercise of First Amendment rights. For example, all student contributors can be expelled if one name is omitted in printing; if one person invokes a right to anonymity which is accorded respect and recognition; if only one contributing organization refuses to be named. The spectre of administrative abuse by school officials of Section 1.3.1.6 cannot be ignored.

As occurred in Talley v. California, 362 U.S. 60 (1960), the Board here seeks to penalize students for distri-

bution of a student publication in the secondary schools that does not have the names of participants disclosed. In Talley this Court stated:

> "There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression....Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind.... Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names." 362 U.S. at 64-65.

Protection of the anonymity of publishers, printers, and distributors of newspapers is an integral, essential, imperative part of our freedom of the press, Bursey v. United States, 466 F. 2d 1059, 1085 (9th Cir. 1972), a press which serves the governed, not the governors, New York Times Co. v. United States, 403 U.S. 713, 717 (1971).

Just as compulsory disclosure of affiliation with groups engaged in advocacy may constitute an effective restraint upon the freedom of association, N.A.A.C.P. v. Alabama, 357 U.S. 449, 462 (1957); Bates v. Little Rock,

361 U.S. 516, 523 (1960), so, too, does the Board's disclosure requirement of the names of individuals and organizations who participate in the publication of the "CCC" chill the students' rights to freedom of press and association. To preserve fundamental constitutional guarantees of public secondary school students, Section 1.3.1.6 must be invalidated.

D.

The "Any Classes Rule" Is An Overbroad "Time, Place and Manner" Regulation Which Could Operate as a Ban on All Nonofficial Student Publications.

Each of the courts below has found Section 1.3.1.1 of amended Rule 11.05 unconstitutionally overbroad. The rule states that "(N)o distributable literature shall be distributed by any student in any school while classes are being conducted in the school in which the distribution is to be made." (Hereinafter the "any classes rule") The two major attacks by the Board upon the decisions below with respect to the "any classes rule" fail to show any reason justifying reversal of the two courts' findings.

1.

The Board's Arguments Concerning Class Arrangements and Schedules Assume Evidence Which Was Not Introduced and For Which the Board Bore the Burden of Proof.

The Board is claiming for this Court that the "places of ... classes are obviously all throughout the school." (Br. Pet. 55). No citations to the record are given in support of that statement because none exist. It is emphatically not obviously the case that each of the high school buildings operated by the Board has classes throughout each building. There is, furthermore, no evidence in the record showing that the only time students would not be in class during the school day "would be during a split lunch or split assembly period." (Br. Pet. 55). The reason for the absence of such evidence is fairly clear: the "any classes rule" along with the others now before this Court were all promulgated after the only evidentiary hearings in this litigation were concluded. To our knowledge, the Board never requested an opportunity to present additional evidence in support of rules such as the "any classes rule." See, e.g. App. 1-3.

The Board should not be permitted

to promulgate regulations and have this Court reverse the courts below on the basis of unfounded allegations with respect to classes and scheduling which are found only in the Board's brief. "There is here no evidence whatever of ... interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone." Tinker, 393 U.S. at 508. The Board has failed "to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." Tinker, 393 U.S. at 509.

To justify the "any classes rule," the Board would have to show at least the following by evidence rather than by argument:

1. That each of its high schools is so designed and constructed that the distribution of literature in any part of each high school necessarily disrupts at least one class conducted somewhere within that high school - even if that class is several hundred feet and one or two stories removed from the place of literature distribution.

2. That a "class" does not include official, supervised extra-curricular activities taking place at each high school such as foreign language clubs, debating, various indoor sports

activities, dramatic and musical events, etc.

3. That activities such as solicitations for year books, raising funds for a school band, (Br. Pet. 39), do not create any class disruptions while distribution of literature does.

4. That the distribution of "CCC" disturbed any classes in any public high schools at any time, together with a showing of the circumstances of such alleged disturbance.

5. That distribution in a school cafeteria of literature would disturb any given classes in any high school operated by the Board.

6. That there would be <u>any</u> time during any day of the week during which some "class" would <u>not</u> be in session at any public high school. Such a showing would necessarily exclude from the definition of "class" evening and early morning sessions together with the extra-curricular activities mentioned above.

The absence of proof on any of the above stated issues is not a matter of supposition. Nor is it speculative to suggest that the "any classes rule" could be applied in a manner which would effecitvely prohibit any distribution of literature at any time <u>any persons were present</u> at a Board controlled high school.

The Board has alleged in the course of its argument concerning another rule, that its rules "do not prevent students from giving away newspapers before or after classes." (Br. Pet. 38). On the same page of their brief, and in other parts as well, they continue to assert that students have no "free time" and that they "are required to be in a class or supervised study or activity virtually every minute of the school day." (Br. Pet. 38). We have nothing in the way of evidence, however, which defines "before or after classes," and we are, therefore, unable to determine if such periods exist in any meaningful way. We are told, for example, that a period of zero to five minutes is all that is allowed as passing time between classes. (Br. Pet. 38). If that allegation is supported by fact, the "any classes rule" could permit distribution of literature for a period of from zero to five minutes before the first "class" of the day in any given high school, and for the same period after the last "class" of the day. In the absence of any genuine evidence on any of these matters, however, one reasonable construction of the "any classes rule" is that it will be effectively a complete ban on literature distribution.

2.

The "Any Classes Rule" Goes Beyond any

Decision on Distribution of Non-Official Student Publications.

Despite the claim that "(s)imilar Board Rules have been examined and upheld by other Courts," the Board does not advance any decisions in support of the "any classes rule."

The courts below, and the appellees from the very beginning of this litigation, have recognized the appropriateness of reasonable "time, place and manner" regulations, properly justified by a factual, evidentiary showing. Cox v. New Hampshire, 312 U.S. 569 (1941); Shuttlesworth v. Birmingham, 394 U.S. 147 (1969). The Board has gone out of its way, however, to make clear its position that no reasonable time, place, or manner of distribution exists so far as it is concerned in any of its high schools if a "class" is in session anywhere at the school. It has even argued that cafeterias during lunch hour are too highly structured to permit literature to be distributed. (Br. Pet. 38, 55-56). Tinker, of course, explicitly recognized the time spent in the cafeteria as one in which students' First Amendment rights were protected and were to be exercised. Tinker, 393 U.S. at 512.

The extensive analysis of the

school environment found in Grayned v. City of Rockford, 408 U.S. 104 (1972) is possibly dispositive of this issue. The Board, it might be noted, cited Grayned as part of its analysis of the "any classes rule" at one point in these proceedings (Br. Pet. 19) but now seeks to distinguish it as a "criminal case." (Br. Pet. 55). Just as Grayned recognized that no one "has an absolute constitutional right to use all parts of a school building or its immediate environs for his unlimited expressive purposes," we think it is equally clear that no public school system has the right to prohibit the use of all parts of a school building or its immediate environs if just one "class" of some kind is in session somewhere in that building. Grayned, 408 U.S. at 117-118. Both Tinker and Grayned must be ignored, if not overruled, in order to reach the ironic point of permitting a quiet picketer to walk on a sidewalk adjacent to a high school building and hand out handbills while classes are in session, but prohibit a student inside the same building from handing out literature in an equally quiet and non-disruptive fashion.

The Board's position is tantamount to saying that no literature distribution can take place inside of a school

building without disturbing a class. Such a position makes a mockery of the concept of "narrowly tailored" rules and "individualized" judgments of expressive activities. Grayned, 408 U.S. at 119.

The decisions in other judicial circuits upon which petitioners have attempted to rely make it clear that none of them would have permitted the "classes being conducted" rule to stand. The Fifth Circuit Court of Appeals in Shanley v. Northeast Independent School Dist., 462 F.2d 960 (5th Cir. 1972) discussed time, place, and manner of distribution limitations, and it was made clear that reasonableness and equality of application were the touchstones for evaluating such rules. The Fourth Circuit in Quarterman v. Byrd, 453 F.2d 54 (4th Cir. 1971) would require the showing of substantial facts which supported a reasonable forecast of substantial disruption or material interference with school activities on account of the distribution of printed material. That Court clearly would not approve a blanket prohibition against distribution of any student publication at any time in any school simply because one or more classes were in session at some location within the school. The Ninth Circuit in Hatter v. Los Angeles City High School Dist., 452

F.2d 673 (9th Cir. 1971) specifically upheld the First Amendment rights of high school students to pass out leaflets before school on a street corner across from the school grounds. It clearly would not approve of the "classes being conducted" rule. The position of the Seventh Circuit is clear not only on the basis of the instant case, but also on the basis of Scoville v. Board of Education, 425 F. 2d 10, cert. den. 400 U.S. 826 (1970) and Fujishma v. Board of Education, 460 F.2d 1355 (7th Cir. 1972). Without summarizing the numerous District Court decisions in other circuits, it should be sufficient to say in summary fashion that none of them would approve the "classes being conducted" rule.

ARGUMENT II

The Board May Not Constitutionally Punish the Infrequent Use of "Earthy Words" Used for Emphasis or Humor on the Bases of Rules Not in Existence, of Distribution to Elementary School Students Which Did Not Occur, or as "Obscene As To Minors" in the Abscence of Erotic Content, Appeals to Prurient Interests and Patent Offensiveness.

A major shift in the position of the Board on this issue has occurred

in the course of the litigation. Before the Seventh Circuit, the Board contended that "students may be disciplined for the use of indecent language, even if not legally obscene" as a minor part of its argument covering barely one page and relying upon the Eighth Circuit opinion in Papish v. Board of Curators of University of Missouri, 464 F.2d 136 (8th Cir. 1972) which was reversed by this Court one month after the Board's brief was submitted. (Br. Pet. 62-63). Papish v. University of Missouri, 410 U.S. 667 (1973), reh. den. 411 U.S. 960. It is clear now, however, that the Board's principal argument before this Court concerning the language which they dislike in "CCC" is that it is punishable "even if such language is held to be filthy, vulgar, and indecent, but not legally obscene as to minors." (Br. Pet. 57).

The shift in argument away from alleging that "CCC" was obscene as to minors (occurring since, and apparently in response to, the decision by the Seventh Circuit in these proceedings) as well as the original Board position on the issue - are analyzed below.

1.

The Board Has Promulgated No Rules

Which Prohibit "Filthy, Vulgar, and Indecent" Language.

It cannot be too strongly stressed that the Board comes to this Court with no rule in existence which prohibits "filthy, vulgar, and indecent" language. The Board is now claiming that this Court must uphold both prior and subsequent restraints against such language (Br. Pet. 69), but it does not pretend to have any rules in existence purporting to regulate such language. Rule 1.1.1.1. applies only to words "obscene as to minors." No rule promulgated by the Board on October 4, 1972 or in conjunction with any other aspect of these proceedings, so much as mentions the words "filthy, vulgar, and indecent."

This Court is accordingly presented with an abstract proposition of law in the absence of an actual rule which embodies the proposition advocated by the Board. Hall v. Beals, 396 U.S. 45 (1969), Diffenderfer v. Central Baptist Church, 404 U.S. 412 (1972). It is well established that this Court will not volunteer an expression of its opinion upon a question which is not properly before it on the record no matter how such opinion may be desired by a party. Bayard v. Lombard,

9 How. 530. By asking this Court to determine the general powers of the Board to punish students for the utilization of such language in the absence of a rule which can be analyzed on the subject, the Court is being asked to decide what is, at best, an anticipatory question. The Court should not decide important constitutional questions unnecessarily or hypothetically. Cincinnati v. Vester, 281 U.S. 439, (1929); Anniston Mfg. Co. v. Davis, 301 U.S. 337 (1937); Allen-Bradley Local 1111 v. Wisconsin Employment Rel. Bd., 315 U.S. 740 (1942).

The Board is, in effect, asking this Court to rule generally with respect to a regulation which has never been written or promulgated. Such a request goes beyond "the task of analyzing a proposed statute, pinpointing its deficiencies, and requiring correction of these deficiencies before the statute is put into effect" which this Court declined to do, holding that "it can seldom be appropriate for these courts to exercise any such power of prior approval or veto over the legislative process." Younger v. Harris, 401 U.S. 37 at 53 (1971). Here, the Court is being asked to give approval to a regulation which has not been written - or, with even more grave consequences for the

First Amendment to grant the Board the general authority to regulate the use of words as it may see fit in the future.

It is also clear that the courts below have not actually ruled on the Board's claimed power to punish students for the use of "language...held to be filthy, vulgar, and indecent..." (Br. Pet. 57). The language which has been the principal point of contention throughout these proceedings has always been construed in light of Section 1.1.1.1. which purports to punish only language which is "obscene as to minors." Indeed, the dissent of Judge Christensen differs from the majority in that he believed the language in question "(m)ore likely obscene" in the Board context than in that of Papish v. University of Missouri, 410 U.S. 667 (1973). (Pet. App. 30-31). This Court should not consider a question which was not passed upon by the Court of Appeals. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 at 397-398 (1971).

2.

These Proceedings Do Not Involve Distribution of Publications To Elementary School Students.

The Board is continuing to claim

that these proceedings involve distribution of non-official student publications to elementary school students. The same claim was advanced before the Seventh Circuit, and it is time to require that the Board come forward with evidence of distribution of the publication to elementary students within its schools. From the very beginning of this litigation, plaintiffs proceeded on a class basis under FRCP 23 (a) and (b) (2) on behalf of "all high school students attending schools managed, controlled, and maintained by the Board of School Commissioners of the City of Indianapolis." (App. 5-6, R.6, Complaint Par. 10). Plaintiffs have been compelled to reiterate that fact throughout these proceedings because the Board has argued as if elementary school students were actually involved. See, e.g. Appellees Brief for the Seventh Circuit, 5.

Enough confusion on this issue was successfully engendered that it became a subject of questioning during oral argument before the Seventh Circuit as reflected in its opinion showing that "plaintiffs conceded that their case was limited to the application of the rules in high schools." (Pet. App. 29, 490 F.2d at 610). Rather than being a "concession" plaintiffs were merely reiterating a position which they had taken from the beginning of the pro-

ceedings by filing their action on behalf of a class which consists only of high school students attending the Indianapolis public schools. Unfortunately, neither the majority nor the dissent in the Seventh Circuit reflected this fact. More importantly, however, no evidence exists in the record of these proceedings on the issue of alleged distribution of "CCC" to elementary school students. Since that evidence does not exist, and since the relief sought by the plaintiffs throughout these proceedings has consistently been limited to the high school setting, the court below clearly "had no occasion to decide whether or not age difference and the like would lead to a different ruling concerning elementary schools." 490 F.2d at 610. Indeed, the majority opinion closes with the clearest possible recommendation to the Board to obtain a limitation of the injunction pending against it so that it would clearly on its face apply only to high schools. The Board has chosen to ignore that invitation.

3.

Neither the "CCC" as a Whole Nor Individual Articles Taken Out of Context Are Obscene.

The Board had no rule concerning publications "obscene as to minors"

when "CCC" was distributed. The District Court correctly recognized that any application of such a rule would necessarily be prospective. 490 F.2d at 609. Recognizing also that we are not in any way talking about a publication "to be distributed among juveniles in kindergarten through high school," (Br. Pet. 62), the following analysis is presented.

a. The language of "CCC" is not erotic, sexually explicit, nor does it appeal to the prurient interest of adults or minors.

Having proposed a version of the tests propounded in Miller v. California, 413 U.S. 15 (1973) "adapted" to the Board's rules (Br. Pet. 58), we are presented with no application of the adapted rule to the facts of this case. The record contains no evidence-not even speculative testimony - indicating that any of the material in "CCC" "appeals to the prurient interest of minors," or "depicts or describes sexual conduct in a manner patently offensive to prevailing standards of the adult community with respect to what is suitable material for minors..." (Br. Pet. 58) We are asked to accept, in the absence of any evidence, the fact that the language of which the Board in complaining "can only appeal to the prurient, shameful

interest of minors." (Br. Pet. 63). Even if there had been evidence that the language was disruptive (and there was none), disruption does not constitute obscenity under any standard.

No comment is to be found in the Board's brief with respect to alleged depictions or descriptions of sexual conduct because there simply are none in "CCC." In the handful of instances that they found offensive out of the considerable content of the five issues of "CCC", we are asked to apply, along with the other standards of the "adapted" Miller test, a standard which requires the whole work to lack serious literary, artistic, political, or scientific value to minors. Among the small instances of allegedly offensive language, we must find that D.H. Lawrence and Christabel Pankhurst have no serious literary, artistic, political, or scientific value to minors. (App. 56-57)

The Board's argument appears to actually be more concerned with offended sensibilities than it does with obscenity. The Board is essentially asking this Court to react to the utilization of a small number of words in print with no evidence on the allegations of disruption and damage allegedly resulting from the use of those words in print except the opin-

ion of Dr. Kalp. The Board has not stressed in its brief before this Court, for example, language which it brought to the attention of the Seventh Circuit. That language included the word "hell," and the phrase "pushy bitch." (Appellants' brief before the Seventh Circuit, 6.) Objection to such language is difficult to imagine on any grounds except offended sensibilities.

Even though no "obscene as to minors" rule existed when "CCC" was established and there was no rule or charge specifically against "CCC" or in general effect concerning "filthy, vulgar, and indecent" language, if this Court decided to reach this issue, the question could be viewed largely as one of determining whether public high school circumstances differed so much from those in a public university as to render Papish v. University of Missouri, 410 U.S. 667 (1973) inapplicable. After initially inquiring about their rights, plaintiffs were informed by the Board that they could not continue to distribute "CCC". At that time, the Board was not utilizing a "non-discriminatory application of reasonable rules governing conduct" but there was "a dual standard in the academic community with respect to the content of speech..." Papish, 410 U.S. at 671.

Cohen v. California, 403 U.S. 15 (1971) involved some of the language of which the Board is complaining in these proceedings. The language was displayed publicly on a jacket inside a courthouse, in the presence of women and children. Relying in part upon Tinker, the Court held that the State could not, in the absence of a more particularized and compelling reason, make the display of the four-letter expletive a criminal offense under the First and Fourteenth Amendments. Cohen, 403 U.S. at 26. Gooding v. Wilson, 405 U.S. 518 (1972) involved a minor demonstration outside of a building in which a United States Army headquarters was located. The Court found that the statute in question could not constitutionally be applied to speech "although vulgar or offensive, that is protected by the First and Fourteenth Amendments." Gooding, 405 U.S. at 520. Eaton v. City of Tulsa, __U.S.__, 39 L. ed. 2d 693 (1974) involved the usage of language, such as that objected to by the Board, in the course of a trial in a municipal courtroom. The Court held that the petitioner could not be subjected to criminal contempt for his usage of the language. In a concurring opinion, it was noted that the controlling fact for one Justice was that the petitioner had received no warnings or cautions with respect to court etiquette. "Language likely

to offend the sensibility of some listeners is now fairly commonplace in many social gatherings as well as in public performances." Eaton v. Tulsa, 39 L. ed. 2d at 696-697. Additionally, the Fifth Circuit has held that "four-letter words" were not obscene per se and could not be constitutionally censored in a public university. Although the publication in question was school-sponsored, it was sold at the university bookstore facilities and - as with the "CCC" was "not being forced on an unwilling audience through public display." Bazaar v. Fortune, 476 F.2d 570, 580 (5th Cir. 1973), pet for cert January 23, 1974 sub nom Fortune v. Bazaar, 42 LW 3504 (No. 73-1144).

Fortune contains several penetrating paragraphs on the "earthy words" which apply to the circumstances of this case. Significantly, the Fifth Circuit noted many works such as The Catcher in the Rye, The Godfather and others which were cited by individual plaintiffs in the instant case as books which they had read, upon the recommendation of the mother of one of the plaintiffs who is a history teacher in a public school system other than in Indianapolis. Relying upon Tinker, among other cases, the opinion in Fortune recognized that the "offensive" words were used as "modi-

fiers strictly included for their effect and to convey a mood." The Court found that no "pandering" was involved. It found that the language was not used in any erotic sense. Bazaar v. Fortune, 476 F.2d at 573. The same findings are valid with respect to the "CCC". The Board's position, as that of the University of Mississippi, eventually abandons obscenity and concentrates upon "taste."

It should be noted that the Fifth Circuit confronted a possible problem of mootness or being called upon to rule on an anticipatory issue. That Court found that the University of Mississippi had no rules regulating the publication in question at the time officials attempted to censor it. Furthermore, the Court stayed the temporary restraining order issued by the district court "to avoid publication which would moot the serious legal issue involved..." Fortune v. Bazaar, 476 F.2d at 571. In this case, as has been discussed above, "CCC" was distributed for approximately one year before voluntary termination of distribution, and it has been distributed since the Board was subjected to the pending injunction in these proceedings.

b. The infrequent use of "earthy words" for emphasis or humor in a non-

official student publication without regard to the specific circumstances of such usage cannot constitutionally be punished by censorship or expulsion.

The "CCC" clearly has never constituted any form of commercial exploitation of obscene material. There are no "hard core" materials of any kind involved in these proceedings. While many adults are not inclined to take seriously the journalistic or literary efforts of high school age people, a genuine review of all five issues of "CCC" would make it difficult to suggest that the publication lacked "serious literary, artistic, political or scientific value..." Miller v. California, 413 U.S. at 34. And, as was recognized by the Seventh Circuit, it goes without saying that Rule 1.1.1.1. does not even approach making an effort at the kind of specificity which this Court found essential in the area of limiting First Amendment expression by defining certain things as "obscenity." Indeed, plaintiffs believe that the Board is essentially asking this Court to write an acceptable "obscene as to minors" rule for it. If the "adapted" Miller tests now proposed by the Board had been promulgated as part of a regulation at the beginning of these proceedings, it would have been possible for the District Court to render an opinion on the allegations

of obscenity against "CCC". (Br. Pet. 58). If this Court passes upon these "adapted" Miller standards, it will be reviewing regulations which do not exist, which have never been applied to the plaintiffs, which are supported by no judicial interpretations of any kind, and which have first appeared in a brief upon the merits before this Court.

The Board has been compelled to rely on one state and one federal lower court decision, each originating in California, and each prior to Cohen, Papish, Eaton, and related cases. One of the two California decisions, Baker v. Downey City Board of Education, 307 F. Supp. 517 (C.D. Cal. 1969) is cited for having upheld schools that "discipline students for indecent language.." (Br. Pet. 69). Two significant facts about Baker should be noted. First, the school board in that case did at least have a rule which required students to "refrain entirely from the use of profane and vulgar language." Baker, 307 F. Supp. at 525. The second, and more significant fact about the case, is that it appears that no other court has ever followed the Baker holding on "vulgarity" and "profanity."

Contrary to the contention that "most courts" have upheld the Board

position (Br. Pet. 69), it appears that a greater number have upheld the position of appellees. See, e.g. Vought v. Van Buren Public Schools, 306 F. Supp. 1388, 1394-1396 (ED Mich.1969). While the Board has correctly noted that the Court below relied upon Sullivan v. Houston Independent School District, 333 F. Supp. 1149 (S.D. Tex.1971), the opinion which occurred with respect to supplemental proceedings found at 475 F.2d 1071 (5th Cir. 1973) is significant in several respects. First, the heart of the holding was that the court merely recognized the right of school authorities to punish students for the flagrant disregard of established school regulations together with the fact that the student plaintiff in the supplemental proceedings was unable to seek equitable relief with clean hands. No issue concerning allegedly obscene words was reached or decided by the Fifth Circuit in that opinion. Vought, on the other hand, dealt specifically with the allegedly offensive language involved in these proceedings, noted that the evidence disclosed that The Catcher in the Rye contained the same language and was required reading along with an issue of Harper's Magazine which contained the same language. Vought, 306 F. Supp. 1388 at 1395-1396.

The decision in Keefe v. Geanakos,

418 F.2d 359 (1st Cir.1969) is perhaps the strongest on the "earthy words" issue. Keefe involved the most horrendous facts imaginable from the Board's point of view. The plaintiff was the head of an english department in charge of coordinating grades 7 through 12 in his high school. He read and discussed "a vulgar term for an incestuous son" contained at several points in an article in the September 1969 issue of the Atlantic Monthly. The teacher was suspended and remained during the litigation in considerable jeopardy of being dismissed over the fact that the language was read aloud and discussed with high school seniors. The Court found that the language involved was an appropriate part of the article, that no disruption to the educational process was involved, that the language was in no sense pornographic, and that the teacher was exercising First Amendment rights in an appropriate fashion. Keefe involves a true "captive audience" as opposed to the situation with respect to the "CCC" whereby students who wished to read the publication were free to obtain one, but it was not thrust, pandered, or in any other way forced upon a "captive audience" of thousands upon thousands of high school students in the Indianapolis secondary public school system.

c. Permitting the Board to censor non-official publications or expel students for producing them merely because they infrequently contained "earthy words" and without regard to time, place, or manner of their distribution, would create an extreme double standard with respect to the usage of words.

At the heart of the Board's position in this case is the argument that the "earthy words" infrequently found in "CCC" are actually harmful to students, disrupt the educational process, dismay teachers and parents, interfere with the attainment of educational objectives, and serve no significant purpose (among other things). It is nonetheless clear - even though the "obscene as to minors" rule was promulgated after the only evidentiary hearings in these proceedings - that the language which the Board seeks to keep out of its schools when contained in "CCC" is necessarily already in its schools in innumerable instances, whether in books, magazines, newspapers, locker room conversation, or otherwise.

The extremity of the double standard which would result from permitting the Board to punish (totally aside from the lack of regulations and related arguments above) the infrequent

use of "earthy words" in a student non-official publication is seen by examining the materials which also would need to be kept out if the rules were applied consistently and uniformly.

Newspapers of national circulation which carried or commented upon language employed by former President Richard M. Nixon contain abundant examples of "earthy words." Editorials such as "Help for the President" in the Wall Street Journal of Wednesday, July 17, 1974, p. 12 would have to be censored in accordance with the Board's view, or removed from any school library, economics or business classroom where they appeared. Webster's New Collegiate Dictionary (1973) appears to contain definitions of virtually all of the language of which the Board is complaining. Webster's New Collegiate Dictionary (1973), 463, 1038 and 1071. Apparently, that rather ubiquitous reference work would also have to be removed from Indianapolis public high schools.

Magazines as diverse as the New Yorker and Time would have to be removed from libraries, english classes, and history classes if they were found in the Indianapolis public high schools. See, e.g. The New Yorker, April 19, 1974, "Moses and LaGuardia, 45 & f;

Time, July 29, 1974, "Passim (see e.g. "Nixon Listens to His Tapes," 23); Time, August 19, 1974 "Stay to Hell Out of This," 18-19. A considerable amount of Shakespeare would have to be removed - or, at least any accompanying notes which explained the meaning of some of the words which are no longer utilized. Mention has been made of various contemporary novels which also would need to be removed. As was pointed out in Keefe, the most objectionable word in these contexts is neither novel nor an adequate basis upon which to punish students or teachers in high schools. Keefe v. Geanakos, 418 F.2d 359 at 361-362.

Although the District Court in Vought was unable to profess any expertise in the area of obscenity, it pointed out that "we do recognize rank inconsistency when we see it." Vought v. Van Buren Public Schools, 306 F. Supp. at 1396.

d. Offended "sensibilities" may not constitutionally be the basis for suppression of allegedly offensive language contained in a non-official high school student publication.

The cases involving injury to "sensibilities" through the use of allegedly offensive language have generally involved oral, non-

commercial expression. Numerous cases have been decided by this Court since Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). Cohen v. California, 403 U.S. 15 (1971) marked the first major decision concerning allegedly offensive language since Chaplinsky. Cohen involved certain factors which we have previously discussed, but which deserve additional emphasis. One of the major factors observed by Justice Harlan was that the language in question did not involve obscenity for "obscene expression...must be, in some significant way, erotic..." Cohen, 403 U.S. at 20. Cohen also is quite significant in that it recognizes value in expression which communicates emotions as well as that which communicates a particular concept or intellectual idea. And, as has been previously recognized, Cohen found that those observers who were offended by the language on the petitioner's jacket "could effectively avoid further bombardment of their sensibilities simply by averting their eyes." Cohen, 403 U.S. at 21. A similar averting of eyes might be the most extreme measure which would need to be taken by any person offended by language visible on a cover of "CCC".

In Gooding v. Wilson, the Court was confronted directly with state court decisions from Georgia which had con-

strued the statute in question as including offenses to public "sensibilities." Gooding, 405 U.S. at 527. In holding the statute unconstitutionally overbroad on its face, in the face of the Georgia state constructions of the statute, the concept of offended "sensibilities" was found to be a constitutionally inadequate basis for suppression of speech.

The Court has reversed or reversed and remanded numerous cases involving allegedly offensive language. See, e.g. Lewis v. New Orleans, 408 U.S. 1053 (1972); Hess v. Indiana, ___U.S. ___, 38 L. ed. 2d 303 (1973); and Eaton v. City of Tulsa, ___U.S.___, 39 L. ed. 2d 693 (1974).

With the exception of Papish v. University of Missouri, 410 U.S. 667 (1973), the most significant offended "sensibilities" decision since Cohen was that in Rosenfeld v. New Jersey, 408 U.S. 901 (1972). Rosenfeld involved the use of language similar to that objected to by the Board in these proceedings. The appellant had utilized one word in particular on at least four occasions during a speech at a public school board meeting. The appellant was charged under a "disorderly person" statute which prohibited the utilization of "loud and

offensive or profane or indecent language." Rosenfeld, 408 U.S. at 904 (Powell J., dissenting). The New Jersey Supreme Court had construed the statute to apply to language which would "affect the sensibilities of a hearer." State v. Profaci, 56 N.J. 346, 353, 266 A 2d 579, 584 (1970), quoted at 408 U.S. at 904 (Powell, J., dissenting). Rosenfeld, as indicated above, was remanded for reconsideration in light of Cohen and Gooding. An excellent analysis of the development of the Court's position on allegedly offensive language is found at 9 Harv Civ Lib-Rights L Rev 1 (1974) "Offensive Language and the Evolution of First Amendment Protection," Mark C. Rutzick.

Papish represents explicit application of the offended "sensibilities" line of cases traced above to an educational setting. As we have previously stated, a resolution of the Board's position on the allegedly offensive language could be based upon a determination of whether or not Papish involves an environment so substantially different from that of Indianapolis high schools as to require a different result in the latter situation. It is again submitted that this Court should not, in the absence of real evidence on the issue, take

judicial knowledge or the allegations of the Board in its brief as a showing that harm, retaliation, fighting, or other "violent reaction," occurred as the result of any of the "CCC" publications. Cohen, 403 U.S. at 21.

ARGUMENT IV

A School Board Rule Which Requires Prior Approval By Public School Authorities Of An Unofficial Student Newspaper Before Publication In The Secondary Schools Is Unconstitutional.

Taken as an entirety, Rules 11.05 and 11.06 unconstitutionally abridge the First Amendment rights of public secondary school students who publish, distribute, sell and/or receive voluntary contributions for the "CCC" (see Arguments I to III, supra). Moreso than "chilling" freedom of the press, the subject rules firmly suppress the full and free exchange of ideas in an environment particularly designed to promote thought and expression. The overbroad, vague restrictions imposed (Argument I, supra) upon the secondary school students in this case effectively preclude publication, distribution and sale of the "CCC" as hereinbefore set forth.

The Board's reliance upon Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) is misplaced in light of Papish, Cohen, supra. Additionally, Chaplinsky involved oral communication

rather than an impermissable prior restraint upon publication, Near, Tinker, Healy v. James, Police Department v. Mosley, supra. The overbreadth of the repressive rules, Fujishima, supra, Eisner v. Stamford Board of Education, 440 F. 2d at 809, the absence of explicit criteria by which school officials may definitively forecast substantial disruption, combined with the absence of any evidentiary basis for banning the "CCC", compels affirmance of the decisions below.

Ironically, the Board seeks a review of rules (Br. Pet. 75-77; Appl 19) which were amended and superceded by those which are now before this Court for adjudication. Evidently, the Board is requesting this Court to select, if not write, rules for the Board. Indeed, Resolution No. 1033 (App. 17-20) adopted in September, 1972, was superceded by the Resolution adopted in October, 1972 (App. 22-25). At no time was Resolution No. 1033 before the trial or appellate court for review, nor can such issue be raised before this Court for the first time. (Argument III A, supra). Conclusively, constitutional issues "will not be anticipated but will be dealt with only as they are appropriately raised upon a record before" this Court. Allen-Bradley Local v. Wisconsin E. Rel. Bd., 315 U.S. at 746 (1942). The record before this Court does not properly raise consideration of rules which were amended, superceded and never previously argued before

either the trial or appellate courts, even if termed as "guidelines" rather than acknowledged as part of an inoperative rule (App. 17-20; Br. Pet. 75-79).

ARGUMENT V

Minor Public High School Students, Who Are The Real Parties In Interest In Litigation Challenging The Constitutionality Of Public High School Regulations Which Require Prior Unilateral Administrative Approval Of Student Publications And Which Prohibit The Sale And Distribution Of Student Publications, May Properly Sue In Federal District Court In Their Own Names Pursuant To Rule 17, Federal Rules Of Civil Procedure, Without Appointment Of A Guardian Ad Litem, Especially Where Some Of The Student Plaintiffs Are No Longer Minors.

Rule 17(a), Federal Rules of Civil Procedure, provides, inter alia, that "(e)very action shall be prosecuted in the name of the real party in interest." The meaning and intent of this statement is analyzed in 3A J. Moore, Frederal Practice §17.02, at 53 (2d ed. 1970) to be:

> "An action shall be prosecuted in the name of the party who, by the substantive law, has the right sought to be enforced."

See, 6 Wright and Miller, Federal

Practice and Procedure, §1542 at 639 (1971). Herein, plaintiffs are the parties who, by the substantive law, are seeking to enforce their fundamental constitutional rights. Indeed, it is now well established that high school students may commence actions seeking relief for infringement of constitutional rights under 42 U.S.C. §1983, Fujishima, et. al. v. Board of Education, 460 F. 2d 1355 (7th Cir. 1972), and that high school students are "persons" entitled to First and Fourteenth Amendment protections, Scoville v. Board of Education of Joliet Tp. H.S. Dist 204, et al, 425 F. 2d 10, 13 (7th Cir. 1970); Tinker v. Des Moines Community School District, 393 U.S. 503 (1969). Our law clearly recognizes the independent constitutional rights of minors without requiring such rights to be derived from those possessed by adult parents. As Mr. Justice Fortas said: "Under our constitution, the condition of being a boy does not justify a Kangaroo Court." In Re Gault 387 U.S. 1, 28 (1967).

The substantive constitutional right which plaintiffs have sought to protect is the right of public high school students to distribute and sell a student publication in the public schools of Indianapolis without prior censorship (Tr. 82-84), a right which belongs to the minor students, see, Travelers Indemnity Company v. Bengtson, 231 F. 2d 263, 265, some of whom under recently enacted Indiana

state law, having attained the age of eighteen (18) years during the course of these proceedings, are no longer under any legal disability, I.C. 34-1-67-1(6) and (15) and, therefore, are not presently minors.

Rule 17(b), Federal Rules of Civil Procecure, provides, inter alia, that "(t)he capacity of an individual, other than one acting in his representative capacity, to sue or be sued shall be determined by the law of his domicile." Examination of applicable Indiana state law reveals that Trial Rule 17(C)(1), Indiana Rules of Trial Procedure, provides:

> "An infant or incompetent person may sue or be sued in any action in his own name,"

Nowhere in Indiana state law is there a mandatory requisite that a minor have a guardian ad litem appointed for the purpose of prosecuting an action in court. Accordingly, it becomes apparent that the formerly minor plaintiffs in this proceeding may sue in their own name without the appointment of a guardian ad litem or other representative. This result is compelled by applying Indiana Trial Rule 17(C)(1) and I.C. 34-1-67-1(6) and (15) to the provisions of Rule 17(b), Federal Rules of Civil Procedure.

Defendants argument that the appointment of a guardian ad litem is mandatory is unmeritorious. As stated in 3A J. Moore, Federal Prac-

tice §17.26, at 901 (2d ed. 1970):

> "We have seen that the capacity of an individual, not acting in a representative capacity, to sue or be sued is determined by the law of his domicile under Rule 17(b). If that law denies the individual capacity upon the ground that he is an infant or incompetent person, the litigation of his rights in the federal courts is subject to the provisions of Rule 17(c)."

Inasmuch as Indiana state law authorizes minors to sue in their own names, defining "minor" as one below eighteen years of age, consideration of the application of Rule 17(c), F.R.C.P., as argued by defendants, is precluded. Thus, independent of the district court's determination that it was not required "to appoint a guardian ad litem for one who presents a constitutional issue to the Court" (App. 26-27) is the principle that the minor plaintiffs, who asserted their constitutional rights, have authorization pursuant to state law to sue in their own names without the appointment of a guardian ad litem. 2 Barron and Holtzoff, Federal Practice and Procedure (Wright ed., 1961), §488.

Defendants' reliance upon Roberts, et al v. Ohio Casualty Insurance Company, 256 F. 2d 35 (5th Cir. 1958), is misplaced. In Roberts it was the un-

represented minor who obtained a reversal for failure to appoint a personal representative. The Roberts case is further distinguishable in that no claim was made in that case that Ohio state law authorized prosecution of an action by minors under Rule 17(b), F.R.C.P. In contrast, plaintiffs in this proceeding assert a fundamental state law right to sue in their own names pursuant to Trial Rule 17(C)(1), Indiana Rules of Trial Procedure, and I.C. 34-1-67-1(6) and (15). No substantial pecuniary interest is presented in this action as opposed to the substantial death benefits present in Roberts, providing yet another differentiating factor.

Where the court makes a judicial determination that a minor is protected without the appointment of a guardian ad litem, it is unnecessary to appoint such a representative, especially where there is no showing of inadequate representation or prejudice to any party. Roberts, supra at 39; see, Till v. Hartford Accident & Indemnity Co., 124 F. 2d 405, 408 (10th Cir. 1941); Westcott v. United States Fidelity & Guaranty Co., 158 F. 2d 20, 22 (4th Cir. 1946); Rutland v. Sikes, 203 F. Supp 276 (E.D.S.C. 1962), aff'd on other grounds, 331 F. 2d 538 (4th Cir.), cert. denied 374 U.S. 830.

Conclusively, the denial of the Petition for Appointment of Guardian Ad Litem on Next Friend for Plaintiffs and All Members of the Class They Purport to Represent by the district

court was proper, compelling affirmance of its decision.

CONCLUSION

For the reasons hereinbefore set forth, respondents respectfully submit that the judgments of the courts below should be affirmed.

Respectfully submitted,

Craig Eldon Pinkus
1125 Circle Tower Bldg.
Indianapolis, Ind. 46204
(317) 638-6551

Ronald E. Elberger
Indiana Civil Liberties Union
445 N. Pennsylvania St.
Suite 604
Indianapolis, Ind. 46204
(317) 635-4056

Attorneys for Respondents